Jurisdictional Statement

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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

JESUS RIVERA RODRIGUEZ, *et al.*,
Appellants

v.

POPULAR DEMOCRATIC PARTY, *et al.*,
Appellees

On Appeal from the Supreme Court of Puerto Rico

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether a statute (1) which adopts the theory that the seat of a legislator elected to represent the people of a particular district "belongs to the political party" of that legislator in the event of a vacancy, (2) which permits only members of that party to be candidates to fill the vacancy, and (3) which permits the party to exclude non-party members from voting in an election to fill the vacancy, violates the First, Fifth, and Fourteenth Amendments, because it

— abridges the constitutionally guaranteed right to vote.

— offends the "one person, one vote" principle, and

— violates the freedom of political association of members of other parties.*

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* Appellants are the following qualified voters residing in Representative District No. 31 of Puerto Rico, who are not affiliated with appellee Popular Democratic Party: Jesus Rivera Rodriguez, Fundador Diaz Cruz, Margot Lopez Batalla, Inocencio Quintero Rivera, Santos Reyes Reyes, Antonio Rivera Carrasquillo, Heriberto Mendez Velazquez, Sergio Rivera Rodriguez, Hector Bermudez Alicia and Roberto Ortiz Hernandez.

Appellees are the Popular Democratic Party (one of the political parties in Puerto Rico), Carlos Romero Barcelo (the Governor of Puerto Rico), and Gerineldo Barreto Perez (the Administrator of Elections of Puerto Rico).

In the court below, the appellee Governor and the appellee Administrator of Elections were aligned with appellants.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT	3
THE QUESTIONS ARE SUBSTANTIAL	5
I. THE DECISION BELOW ABRIDGES FUNDAMENTAL RIGHTS	6
A. The Puerto Rico Electoral Law Infringes Various Constitutional Rights	6
B. The "Party Ownership" Theory Cannot Survive The Constitutionally Required Standard Of Strict Scrutiny	9
II. THE ISSUES ARE IMPORTANT	16
CONCLUSION	18

APPENDICES

APPENDIX A:	Opinion and Judgment of Superior Court	1a
APPENDIX B:	*Per Curiam* Opinion of Supreme Court of Puerto Rico	1b
	Separate Opinion of Justice Davila	15b
	Separate Opinion of Justice Irizarry Yunque	16b
	Dissenting Opinion of Justice Martin	19b
	Dissenting Opinion of Justice Negron Garcia and Justice Martin	22b
APPENDIX C:	Judgment of Supreme Court of Puerto Rico	1c
APPENDIX D:	Resolution Denying Rehearing	1d
APPENDIX E:	Notice of Appeal to Supreme Court of the United States	1e
APPENDIX F:	Statutes Involved	1f
APPENDIX G:	Table of Statutory Provisions for Filling Vacancies in State Legislatures	1g

TABLE OF AUTHORITIES

	Page
CASES:	
Balzac v. Porto Rico, 258 U.S. 298 (1922)	2
Buckley v. Valeo, 424 U.S. 1 (1976)	10,14
California Medical Association v. Federal Election Commission, No. 79-1952, slip op. (U.S. June 26, 1981)	14
Carrington v. Rash, 380 U.S. 89 (1965)	9,12,14
Democratic Party of the United States v. LaFollette, 101 S.Ct. 1010 (1981)	10,16
Dunn v. Blumstein, 405 U.S. 330 (1972)	8,9,12
Farley v. Farley, 481 F.2d 1009,1012 (3d Cir. 1973)	16
Harman v. Forssenius, 380 U.S. 528 (1965)	12
Hicks v. Miranda, 422 U.S. 332 (1975)	16
Hill v. Stone, 421 U.S. 289 (1975)	10
Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173 (1979)	9,10
Jackson v. Ogilvie, 426 F.2d 1333 (7th Cir.), *cert. denied*, 400 U.S. 833 (1970)	7
Kaelin v. Warden, 334 F. Supp. 602 (E.D. Pa. 1971)	15,16
Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969)	10
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971)	15
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	15
Parker v. Nobles, 496 S.W. 2d 921 (Tex. 1973)	16
Patterson v. Burns, 327 F. Supp. 745 (D. Hawaii 1971)	12
Reynolds v. Sims, 377 U.S. 533 (1964)	*passim*
Stanley v. Illinois, 405 U.S. 645 (1972)	14
Storer v. Brown, 415 U.S. 724 (1974)	13

	Page
Sweezy v. New Hampshire, 354 U.S. 234 (1957)	16
Torres v. Puerto Rico, 442 U.S. 465 (1979)	2,6
Valenti v. Rockefeller, 292 F. Supp. 851 (S.D.N.Y. 1968), *aff'd per curiam*, 393 U.S. 405 (1969)	7
Wesberry v. Sanders, 376 U.S. 1 (1964)	6
Williams v. Rhodes, 393 U.S. 23 (1968)	9,11,13
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	6
U.S. CONSTITUTION:	
Article I, § 2, cl. 4	11
Amendment XVII	11
STATUTES:	
Electoral Law of Puerto Rico	
16 L.P.R.A. § 3206	2,3,12
16 L.P.R.A. § 3207	2,3,12
Judiciary And Judicial Procedure Act, 28 U.S.C. § 1258(2)	2,16
Puerto Rican Federal Relations Act, 48 U.S.C. § 731c	6
Puerto Rico Constitution Approval Act of July 3, 1952, Pub. L. 447, 66 Stat. 327 (1952)	6
MISCELLANEOUS:	
L. Tribe, American Constitutional Law, § 13-18 (1978)	14
63 Am. Jur. 2d, *Public Officers & Employees*, § 128 (1972)	7

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JURISDICTIONAL STATEMENT

Appellants request that the Court accept jurisdiction of this appeal and reverse the judgment below.

OPINIONS BELOW

The opinion of the Superior Court of Puerto Rico (App. A 1a-36a), and the *per curiam*, concurring, and dissenting opinions of the Supreme Court of Puerto Rico (App. B 1b-33b) are not yet reported.

JURISDICTION

This case arises out of a suit for declaratory and injunctive relief brought in the Superior Court of Puerto Rico by the appellee Popular Democratic Party ("PDP") against the appellee Governor of Puerto Rico and the appellee Administrator of Elections of Puerto Rico. The question posed was the proper application of Articles 5.006 and 5.007 of the Electoral Law of

Puerto Rico, 16 L.P.R.A. §§ 3206, 3207. Appellants intervened as defendants. Appellants and both the Governor and the Elections Administrator argued that, if the statutes were construed and applied as urged by the PDP, they would violate various provisions of the United States Constitution. The Superior Court, however, construed the statutes as urged by the PDP, and upheld the constitutionality of the statutes (App. A 32a-35a).

Appellants as well as the Governor and Elections Administrator then obtained review by the Supreme Court of Puerto Rico. On May 8, 1981, that court entered the judgment appealed from (App. C). The court's *per curiam* opinion expressly upheld the statutes against the constitutional challenge made by appellants (App. B 13b-15b). Appellants filed a timely motion for reconsideration on May 22, 1981, reiterating their constitutional objections. The Governor had filed a timely motion for reconsideration on May 14, 1981. Both motions were denied on May 27, 1981 (App. D). On May 28, 1981, appellants filed with the court below a notice of appeal to this Court (App. E).

This case is properly before this Court on appeal. Under 28 U.S.C. § 1258(2), the Court has jurisdiction to review by appeal a final judgment of the Supreme Court of Puerto Rico that sustains the validity of a statute of Puerto Rico against the claim that the statute is repugnant to the United States Constitution. *See, e.g., Torres v. Puerto Rico,* 442 U.S. 465, 468 (1979); *Balzac v. Porto Rico,* 258 U.S. 298, 300-302 (1922). The judgment of the Supreme Court of Puerto Rico in this case was a final judgment that upheld the constitutionality of Articles 5.006 and 5.007 of the Electoral Law against appellants' challenge to the validity of those sections.

STATUTES INVOLVED

Articles 5.006 and 5.007 of the Electoral Law of Puerto Rico, 16 L.P.R.A. §§ 3206, 3207, are reprinted in App. F, *infra.*

STATEMENT

In this case, the Supreme Court of Puerto Rico has upheld the constitutionality of Puerto Rico statutes that confer on a political party the ownership of a seat in the House of Representatives, so that members of the party have the exclusive right to fill a vacancy in that seat. Specifically, the court upheld a system in which only members of a single party were eligible to run for almost a full four-year legislative term and in which only the members of that party were allowed to participate in selecting the new Representative.

1. At the general election on November 4, 1980, Ramon Muniz, a member of the appellee Popular Democratic Party ("PDP"), won the contested election to represent the people of District 31 in the House of Representatives, one of the two houses of the Puerto Rico legislature. His margin of victory was slim; his victory was the result of "cross over" votes from people who did not vote a straight party-line ticket.[1] Representative Muniz died on January 28, 1981, with almost the full four years remaining in his term of office.

The following month, acting under Art. III, Section 8 of the Constitution of Puerto Rico and under Articles 5.006 and 5.007 of the Electoral Law of Puerto Rico, 16. L.P.R.A. §§ 3206, 3207, the Governor called a by-election to fill the vacancy caused by the death of Representative Muniz. The Governor's call for the election specified that all qualified electors in

[1] If only the "straight" (party line) ballots had been considered, Rep. Muniz would have lost the election. His winning plurality resulted from votes cast for him by electors who "split their ticket." The results of the election were as follows:

VOTES

Party	Candidate	Straight Ballot	Mixed Ballot	Total
Popular Democratic (PDP) ("Commonwealth")	Ramon Muniz	16,957	2,234	19,191
New Progressive (NPP) ("Statehood")	Erick Hernandez	17,263	1,282	18,545
Independence (PIP)	A. Marquez Borges	1,414	1,039	2,453
Socialist (PSP)	C. A. Fonseca Acevedo	105	30	135

Representative District 31 were entitled to vote in the by-election, but that the PDP, of which Rep. Muniz had been a member, was the only political party that could nominate candidates to run. Other candidates were to be permitted to run only as "independents."

On March 3, 1981, the PDP filed the present action against the Governor and the Administrator of Elections, urging the Superior Court to declare that, as a matter of law, only members of that party could run as candidates to fill the vacant office. The PDP also asked the court to enjoin any candidate or elector not affiliated with that party from participating in the election.

In response, the Governor argued that, if the statutes were interpreted as the PDP urged, they would violate the First, Fifth, and Fourteenth Amendments to the United States Constitution. Appellants, as qualified electors of District 31 not affiliated with the PDP, intervened as defendants and argued that the United States Constitution required an open by-election in which members of all parties could participate as candidates and voters.

On March 20, 1981, the Superior Court construed the statutes as requested by the PDP and rejected the constitutional objections made by the Governor and the appellants. The court ruled that, in the by-election to be held, only candidates and electors affiliated with the PDP could participate (App. A 36a). Thereafter, the PDP held a primary in which only its members participated, and selected its designee to represent District 31.

2. The Governor and appellants then secured review by the Supreme Court of Puerto Rico, arguing that under the Superior Court's interpretation, the statutes violated the constitutional rights of the voters in District 31. In a *per curiam* opinion dated May 8, 1981 (accompanied by four concurring or dissenting opinions), the Supreme Court modified the judgment. The court interpreted the Electoral Law as permitting the party of the deceased legislator to select his replacement by any mechanism considered appropriate by the party, including a primary election in which only candidates from the party

could run and only members of that party could vote (App. B 4b-6b). In holding that an election to select a successor to a legislator who died while in office may, constitutionally, be limited to candidates and voters who are members of the same party as that of the deceased legislator, the court reasoned that the vacant seat "belongs to the party that nominated the legislator" who died (App. B 14b).

Two Justices dissented, noting that the "restrictive interpretation" of the Court, excluding all qualified voters from participation in an election, "places the statute on the threshhold of unconstitutionality" (App. B 33b) (dissenting opinion of Negron Garcia and Martin, JJ.). *See also* App. B 19b-22b (dissenting opinion of Martin, J.).

The court also discussed other procedures that would be followed if the deceased legislator's party failed to choose the replacement within the time specified or presented more than one of its members as candidates for the office, but neither of those alternatives is a realistic one, and, in fact, neither occurred in this case. The PDP precluded the participation of any other candidates or voters in filling the vacant seat by selecting a single candidate through a primary election from which appellants and other voters and candidates not affiliated with the PDP were excluded.

On July 6, 1981, in accordance with the mandate of the court below, and following this Court's denial of a stay on June 28, 1981, the candidate chosen solely by the PDP was sworn in as the new Representative of the people of District 31 for the next three and one-half years. As a result of the decision below, Representatives affiliated with the PDP have a one-vote majority in the House.

THE QUESTIONS ARE SUBSTANTIAL

The court below has interpreted the Puerto Rico election laws to permit one political party to fill a particular legislative seat without any vote by the electorate whatsoever or through a primary election from which all non-party members have been excluded both as candidates and as voters. These restrictions upon the franchise imperil fundamental freedoms that this

Court has recognized in a long line of decisions involving voting rights, the First Amendment, and the equal protection of laws.

All of these constitutional principles apply with full force to Puerto Rico. *See Torres v. Puerto Rico, supra,* 442 U.S. at 469-70. Significantly for this case, Congress has expressly insisted that Puerto Rico must adhere to the "republican form of government" and must observe the principles of the United States Constitution. *See* 48 U.S.C. § 731c and Pub. L. 447, 66 Stat. 327 (1952). To defend the restrictions contained in the Puerto Rico Electoral Law, therefore, the PDP must demonstrate that they are necessary to secure compelling governmental interests. The PDP cannot carry this burden.

I.

THE DECISION BELOW ABRIDGES FUNDAMENTAL RIGHTS.

A. The Puerto Rico Electoral Law Infringes Various Constitutional Rights.

1. The controlling principles are by now well established. Most fundamentally, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society." *Reynolds v. Sims,* 377 U.S. 533, 555 (1964). Thus, "each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies." *Id.* at 565. Since "representative government is in essence self-government through the medium of elected representatives of the people," restrictions on the right to vote to elect legislators "strike at the heart of representative government." *Id.* at 555, 565. *See Wesberry v. Sanders,* 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined"); *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886) ("the political franchise of voting is . . . preservative of all rights").

In light of the transcendent importance of the right to vote, each citizen must have an "effective voice in the election of members of his state legislature." *Reynolds v. Sims, supra,* 377

U.S. at 565. Accordingly, there is a basic constitutional right to vote for representatives in the general legislature. A statute that either eliminates that right altogether—even in the case of a successor legislator—or that excludes a class of citizens from the electoral process trenches on this fundamental right. As construed by the court below, the Electoral Law of Puerto Rico, which is not limited to a temporary suspension of the franchise, has precisely this impermissible effect.

The lower federal and state courts have consistently recognized that:

> "the only excuse for the appointment of any officer made elective under the law is founded on the emergency of the public business, and that when an elective office is made vacant the policy of the law is to give the people a chance to fill it as soon as practicable." 63 Am. Jur. 2d, *Public Officers & Employees,* § 128 (1972).

Moreover, when the courts have had occasion to construe their constitutional and statutory provisions governing temporary appointments to elective offices, they have repeatedly interpreted them "to permit an appointee to remain in office 'only until the people who elected his predecessor have the first opportunity to fill the office with a person of their own choice . . . . ' " *Valenti v. Rockefeller,* 292 F. Supp. 851, 883 (S.D.N.Y. 1968) (3-judge court) (Frankel, J., dissenting), *aff'd per curiam,* 393 U.S. 405 (1969).

As the Court noted in *Reynolds v. Sims, supra,* 377 U.S. at 565, legislatures must be "responsive to the popular will." This guarantee of responsiveness requires that the voters have the opportunity to express their *current* preference, when a legislative vacancy occurs. Thus, at the federal level, for example, an open by-election must be held to fill a vacated House seat, even when only a few months remain in the term, because "the people's right to chosen representation is not limited to exercise at a biennial election, but *is a continuing right* which is not to be defeated by death of a Representative once chosen, or other cause of vacancy." *Jackson v. Ogilvie,* 426 F.2d 1333, 1336 (7th Cir.), *cert. denied,* 400 U.S. 833 (1970) (emphasis added).

The Electoral Law of Puerto Rico, by contrast, has been construed and applied to deny to the residents of District 31 the right to an open election to choose the person who is to "represent" them for nearly four years.

2. The legislative scheme upheld below also denies equal protection to the residents of District 31. In "decision after decision," the Court has ruled that a citizen has a constitutionally protected right to participate in the electoral process on an "equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). In the seminal decision, *Reynolds v. Sims, supra*, the Court recognized that "all voters, as citizens of a State, stand in the same relation" and must have an equal voice in the legislative process, "regardless of where they live." 377 U.S. at 565. In this case, however, while the residents of every other legislative district in Puerto Rico have chosen their incumbent representatives in free and open elections, the residents of District 31 have essentially been disenfranchised.

Unlike every other citizen of Puerto Rico, these residents are to be "represented" for almost four years by a legislator who owes his office not to any district-wide popular constituency, but rather to a single political party. The residents of District 31 who are not members of the PDP have been excluded altogether from the selection of their new "representative," and the residents who are affiliated with the PDP have been denied the opportunity to cross party lines and vote for a candidate from a different party. Thus, the residents of this District do not enjoy the benefit possessed by the residents of every other district: representation in the House by a legislator whom they have chosen in a free and open election.

3. There is a specially insidious aspect to the restriction upon the franchise in this case. The exclusion of candidates and voters rests solely on political party membership. Classifications based on political affiliation, however, are inherently "suspect" because they impinge on the First Amendment right to freedom of association. *See Dunn* v. *Blumstein, supra*, 405 U.S. at 333, 338-39. The exclusion of a political party from the ballot burdens both "the right of individuals to associate for the advancement of political beliefs," and "the right of qualified

voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Both of these rights rank "among our most precious freedoms." *Id.* *See also Illinois Elections Board v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). Yet, these rights have been absolutely denied to those residents of District 31 who have chosen not to affiliate themselves under the PDP. " 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Carrington v. Rash*, 380 U.S. 89, 94 (1965). *See also Dunn v. Blumstein, supra*, 405 U.S. at 355 (" 'Differences of opinion' may not be the basis for excluding any group or person from the franchise.").

4. In addition, the party-line classification system employed by Puerto Rico in determining who is to have a say in selecting Representative Muniz's replacement is both over-inclusive and under-inclusive. Apparently, not all PDP members in District 31 voted for Representative Muniz, but some residents not affiliated with the PDP did. Indeed, the latter class of voters provided his margin of victory. *See* note 1, *supra*, p. 3. It is ironic that PDP members who did not vote for Representative Muniz were entitled to participate in choosing his successor. But it is fatal that even the non-PDP affiliates who exercised their independence to vote for him have now been effectively disenfranchised from selecting his replacement. This statutory classification "is all too imprecise" to satisfy the Constitution. *Dunn v. Blumstein, supra*, 405 U.S. at 351.

B. The "Party Ownership" Theory Cannot Survive The Constitutionally Required Standard Of Strict Scrutiny.

The court below sustained this statutory scheme for filling a vacancy in the legislature because it concluded that there is a compelling governmental interest in the notion that a legislative seat "belongs to the party who nominated the legislator" (App. B 14b). The "compelling governmental interest" test is the one that the PDP must meet, but nothing in this Court's jurisprudence sustains this dubious principle of "party ownership" of a legislative seat, when the principle is used to deny or restrict the right of otherwise qualified citizens to vote for the legislative representative of their choice.

1. Since the right to exercise the franchise "in a free and unimpaired manner is preservative of other basic civil and political rights," any infringement of the right of citizens to vote "must be carefully and meticulously scrutinized." *Reynolds v. Sims, supra,* 377 U.S. at 562. To sustain restrictions on the franchise, the government must demonstrate that the statutory classification is "necessary to serve a compelling interest." *Illinois Elections Board v. Socialist Workers Party, supra,* 440 U.S. at 184. *See also, e.g., Hill v. Stone,* 421 U.S. 289, 297 (1975); *Kramer v. Union Free School District No. 15,* 395 U.S. 621, 627 (1969). The same high standard of scrutiny applies, of course, to statutes that burden the First Amendment freedom of association in political affairs. *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 44-45 (1976).

2. Although this Court has recognized the constitutional autonomy of political parties in the conduct of their *internal* affairs, *e.g., Democratic Party of the United States v. LaFollette,* 101 S.Ct. 1010, 1018-1021 (1981), one searches in vain for any support for the idea that the government may award a political party the prerogative of installing its choice to fill a vacancy in the general legislature. Legislative representatives occupy seats that belong to the people of their districts; the seats are not hereditary party fiefdoms.

3. The experience and practice of the federal government and of most State governments show that it is unnecessary to condone the replacement of legislators either by appointment or by a skewed electoral process. The United States Constitution and the laws of most States provide, instead, for an open election to fill legislative vacancies.[2] There is no evidence of serious disruption or political turmoil resulting from this widespread adherence to a system that protects the voting rights of all citizens. Indeed, even the Puerto Rico statutes at issue here recognize that open by-elections are feasible, for the court below construed the statutes as providing for by-elections in some circumstances.

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[2] See Appendix G, a table summarizing procedures for filling vacancies in the State legislatures.

The federal experience is particularly instructive. The Constitution unequivocally requires that vacancies in both Houses of Congress be filled by means of open elections. *See* U.S. CONST., Art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."), and U.S. CONST. amend. XVII ("When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies . . ."). [3]

The majority of States today follow the same constitutional practice. The Superior Court of Puerto Rico took comfort from the fact that several States also apparently have provided for party-controlled appointment under the concept that the seat "belongs to the party," *see* App. A 33a, a finding noted with approval by the Puerto Rico Supreme Court, *see* App. B 14b n.5. What is of paramount significance, however, is that an overwhelming majority of the States have *not* found any compelling reason to adopt this restrictive procedure but continue to fill vacated seats in their legislatures by open elections. *See* App. G.

The pattern established by the federal government and most States provides persuasive evidence that no compelling governmental interest justifies Puerto Rico's refusal to hold an open by-election in this case. *See, e.g., Williams v. Rhodes, supra,* 393 U.S. at 33 n.9 (fact that most States had more lenient ballot access laws seriously undermined Ohio's argument that easy ballot access would lead to unmanageable

[3] Although the Seventeenth Amendment expressly permits the States to provide for the filling of vacancies in the Senate by appointment, there are unique historical reasons for this explicit exception. Moreover, any appointment may only be "temporary . . . until the people fill the vacancies by election . . . ."

It is one thing, of course, to provide for a temporary appointment until a by-election is held. It is quite another thing to divest the people of their right ever to fill the vacancy by election—a difference brought into stark relief here, where the PDP has been empowered to select the Representative to fill the nearly four years remaining in the term to which the people of District 31 elected Representative Muniz.

elections and voter confusion); *Harman v. Forssenius,* 380 U.S. 528, 543 (1965).

Even Puerto Rico's own electoral laws implicitly concede the feasibility of contested elections to fill legislative vacancies. As the court below construed Article 5.006, if the deceased legislator's party fails to present a nominee to fill the vacant seat, "the Governor shall ... call a by-election where persons affiliated to any party or independent candidates who meet the requirements of the office may run." App. B 15b. Article 5.006 also calls for an election when the party decides to present more than one candidate to fill the vacant seat. Moreover, the third paragraph of Article 5.006, taken together with Article 5.007, provides that, if the former legislator was an independent, any candidate who fulfills the requirements of the office may run in an election in which all qualified voters may vote. *See* App. F 1f-2f. Since Puerto Rico itself has specifically provided for an open electoral process in various circumstances, any allegedly compelling interest in refusing to hold open elections must be viewed with great skepticism. *See Dunn v. Blumstein, supra,* 405 U.S. at 359. *See also Carrington v. Rash, supra,* 380 U.S. at 95; *Patterson v. Burns,* 327 F. Supp. 745, 754 (D. Hawaii 1971) (three-judge court) (using a similar rationale to hold unconstitutional a State statute for appointment to fill certain legislative vacancies).

4. Even viewed most credulously, each of the interests mentioned by the court below dissolves upon scrutiny. The Supreme Court of Puerto Rico suggested the following reasons for upholding the "party ownership" theory:

> "[T]here is a compelling public interest directing the lawmaker to consider that the vacant seat belongs to the party who nominated the legislator. Among those compelling interests the following can be singled out: that there be *no changes in the legislative balance* until the next general election is held, the *stability of governmental structures,* the *protection of the electoral mandate* of the previous general election, and the *reduction of inter-partisan political campaigns*

> to once every four years." App. B 14b (emphasis added).

Not surprisingly, the court did not analyze these putative objectives or explain how any of them rises to the level of a compelling interest.

The references by the Puerto Rico Supreme Court to the preservation of the legislative balance, government stability, and the protection of the electoral mandate all seem to come down essentially to one thing: the assertion that a political party has a legitimate right to maintain a constant level of legislative power despite its inability to secure popular support for its candidate in a by-election. Quite apart from the fact that the federal government and most States do not recognize such a right, the decisions of this Court decisively refute any such notion.

In *Williams v. Rhodes, supra,* for example, Ohio argued that its attempt to promote "political stability" constituted a compelling state interest justifying election laws that hindered new political parties from obtaining a place on the ballot. This Court rejected that rationale, noting that the challenged system of ballot access in effect tended to give the entrenched political parties "a complete monopoly." 393 U.S. at 32. Yet the Ohio laws invalidated in *Williams v. Rhodes* at least allowed the *two* parties to compete in the political arena, whereas Puerto Rico would afford a single party a monopoly in the strictest sense. The Constitution simply will not permit the preservation of party power to be erected as a bar to "[c]ompetition in ideas and governmental policies [which] is at the core of our electoral process and of the First Amendment freedoms." *Id.* [4]

[4] Nothing in *Storer v. Brown*, 415 U.S. 724 (1974), is to the contrary. The Court there sustained a California "disaffiliation" requirement designed to insure that independent candidates had severed their relationships with established parties. The Court relied on the State's interests in preventing "inter-party raiding" and in warding off "frivolous or fraudulent candidacies." *Id.* at 731-33. No similar interests are at stake here. Moreover, to say that the State may have a legitimate interest in regulating the number of candidates on the ballot is not to say that the number may be reduced to one or that an election may be dispensed with entirely.

These principles apply to the filling of legislative vacancies in mid term. Those in power, of course, always have a stake in preserving the political status quo. Yet, the "capacity to displace incumbents in favor of the representatives of a recently coalesced majority is ... an essential attribute of the election system in a democratic republic." L. Tribe, AMERICAN CONSTITUTIONAL LAW § 13-18, at 774 (1978). If the voters are unwilling to elect a candidate of the same party as his predecessor, there is no legitimate, much less compelling, interest in frustrating the majority's current will.

Although it may be easier and less expensive to dispense with by-elections, these interests do not justify limiting "interpartisan political campaigns to once every four years." App. B 14b. Administrative convenience, like speed and efficiency, *cf. Stanley v. Illinois,* 405 U.S. 645, 656 (1972), is a shakey ground on which to rest abridgement of the right to vote:

> " 'The right . . . to choose,' . . . that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Carrington v. Rash, supra,* 380 U.S. at 96.

Moreover, the government has no legitimate concern in "protecting" parties from the costs that they may choose to incur in election campaigns:

> "The First Amendment *denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise.* In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley v. Valeo,* 424 U.S. 1, 57 (1976) (emphasis added). *See also California Medical Association v. Federal Election Commission,* No. 79-1952, slip op. at 12 (U.S. June 26, 1981).

Any governmental goal of keeping the strains of political debate confined to quadrennial elections impermissibly frustrates fundamental freedoms of speech and association—freedoms that have their "fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971). Our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" hardly permits Puerto Rico to preempt a political campaign to fill a legislative vacancy in order to achieve quietude. *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964).

Finally, although political parties serve an important and constitutionally protected role in aggregating and channeling individual political preferences, they do so only in service of the right of individual voters to participate in the electoral process, a right that is "individual and personal in nature." *Reynolds v. Sims, supra,* 377 U.S. at 561. Parties, therefore, can have no legitimate interest in procedures that undermine the exercise of this right by preempting or crimping legislative elections.

To put the point another way, legislators are elected by and represent the individual citizens of their districts, not political parties. *See Kaelin v. Warden,* 334 F. Supp. 602, 607 (E.D. Pa. 1971) (three-judge court). This case illustrates these practical truisms. Representative Muniz was not elected by the PDP as a separate entity, or even by its membership alone. His narrow victory would not have been achieved if all electors had voted party line ballots. Nor is there any reason in law or history to presume that Representative Muniz or any elected legislator would have functioned as an automaton who would invariably have done his party's bidding once elected. In no realistic sense, therefore, did the voters of District 31, by electing Representative Muniz, delegate to the PDP their constitutional right to select their representative. Thus, the PDP has no valid—much less compelling—claim to "ownership" of the seat to which the voters of District 31 elected Representative Muniz.

It is more than a little ironic that Puerto Rico, ostensibly acting in the name of "party autonomy," *see* App. B 5b, should attempt to impose limits on the constitutionally protected activities of members of all parties other than the PDP. As the Court reiterated this past Term in *Democratic Party of the United States v. LaFollette, supra,* any interference with the freedom of a party "is simultaneously an interference with the freedom of its adherents," 101 S.Ct. at 1019, *quoting Sweezey v. New Hampshire,* 354 U.S. 234, 250 (1957). No government, therefore, may properly grant special privileges to one party at the expense of other parties and their members.

Thus, the allegedly compelling interests in "party ownership" of a vacant legislative seat not only lack persuasive force but actually reflect anti-constitutional goals.[5]

II.

THE ISSUES ARE IMPORTANT.

Congress has placed this type of case, challenging the constitutionality of Puerto Rico statutes, within the Court's obligatory jurisdiction. 28 U.S.C. § 1258(2). *Cf. Hicks v. Miranda,* 422 U.S. 332, 344 (1975). The issues presented by this appeal merit the Court's careful attention.

What is at stake here are rights that this Court has characterized as fundamental in a democratic society, and as critical to the preservation of other civil liberties: the right to

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[5] The only case cited by either court below to justify the "party ownership" concept (App. A 35a) was *Parker v. Nobles,* 496 S.W.2d 921, 924 (Tex. 1973). That case, however, merely upheld the State's right to authorize a local court to appoint someone to fill a vacancy in the elective office of county sheriff. Neither the "party ownership" notion nor a seat in the general legislature was involved.

In *Kaelin v. Warden,* 334 F. Supp. 602, 607-608 (E.D. Pa. 1971), a three-judge court, over sharp dissent, upheld a Pennsylvania statute requiring the county court to fill a vacancy on the three member board of county commissioners by selecting someone of the same political party. The court reached that result because the requirement was part of a peculiar system for multiple votes for at-large seats, which was designed to insure minority representation on the board. *See also Farley v. Farley,* 481 F.2d 1009, 1012 (3d Cir. 1973) (holding that the issues raised in *Kaelin* as well as related issues continue to present a substantial federal question).

vote for the officials who make the laws and the right to participate in the electoral process on an equal footing with other citizens. There are persuasive precedents that establish that thousands of residents of District 31, including appellants, have been unconstitutionally denied the opportunity to have a voice and a choice in selecting the legislator who purportedly is to represent the people of this District for nearly four more years. As a result of the decision below, the PDP possesses a one vote majority in the House of Representatives, a majority that it might not enjoy if the voters of District 31 had been allowed to decide for themselves who should succeed Representative Muniz.

The court below reasoned that it is not necessary to have any type of election to fill a legislative vacancy. As shown by Appendix G, however, most States, as well as the federal government, reject this notion. Nevertheless, a number of States do permit appointment rather than election of successor members of their legislatures, at least temporarily or to fill the balance of shorter terms. This case questions the constitutional validity of this approach, and surely presents an issue of considerable national importance.

Moreover, the court below also relied on the specially suspect theory that a political party may be deemed to "own" a legislative seat and, therefore, to control the selection of the person who will fill a vacancy in it. The vast majority of States reject this approach, but as Appendix G summarizes, it appears that 14 States join Puerto Rico in adopting this theory and in entrusting this replacement power to a single political party. The constitutionality of the "party ownership" doctrine thus presents a question of practical consequence that far transcends Puerto Rico's adherence to the notion. This case, accordingly, amply satisfies the criteria for review on the merits.

CONCLUSION

For the reasons stated, the Court should consider whether the decision below is so clearly in conflict with controlling constitutional principles that summary reversal is in order. In the alternative, the Court should note probable jurisdiction and set the case for plenary consideration.

Respectfully submitted.

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August 1981.

Appendix

(Translation)

APPENDIX A

IN THE

Superior Court of Puerto Rico

San Juan Part

Civil No. PE81-316 (907)

Re: Declaratory Judgment and Injunction

POPULAR DEMOCRATIC PARTY,
Plaintiff

v.

CARLOS ROMERO BARCELÓ, Governor of Puerto Rico

and

GERINELDO BARRETO PÉREZ,
General Administrator of Elections,
Defendants

OPINION AND JUDGMENT

This is an action for Injunction and Declaratory Judgment challenging the determination of the Governor of Puerto Rico, Hon. Carlos Romero Barceló, to call a by-election to fill the vacancy caused by the death of the Hon. Ramón Muñiz on January 28, 1981. At the general election held on November 4, 1980, the Popular Democratic Party candidate Muñiz was elected to hold the seat for Representative District No. 31. At the moment of his death, he was exercising his legislative functions. After consulting with the Secretary of Justice—who

issued an Opinion on February 12, 1981—the Governor issued the following call on February 26, 1981:

WHEREAS: On January 28, 1981 a vacancy occurred in the office of Representative in the House of Representatives of the Commonwealth of Puerto Rico, which vacancy corresponds to Representative District No. 31 and was caused by the death of Atty. Ramón Muñiz, who had been elected for the above-mentioned office at the General Election held in Puerto Rico on November 4, 1980.

WHEREAS: Article III, Section 8, of the Constitution of the Commonwealth of Puerto Rico provides:

> "If a vacancy occurs in the office of Senator or Representative for a district, such vacancy shall be filled as provided by law."

WHEREAS: Article 5.006 of the Electoral Law of Puerto Rico, Act No. 4 of December 20, 1977, provides the procedure to follow when there is a vacancy in the office of Senator or Representative for a District nominated by a Party before the fifteen (15) months immediately preceding the date of the following General Election.

WHEREAS: On February 12, 1981, the Acting Secretary of Justice issued an Opinion where he states that, pursuant to arts. 5.006 and 5.007 of the Electoral Law of Puerto Rico, the Governor shall call all the electors without restricting the participation of those electors who are duly qualified as such.

WHEREAS: The Hon. Carlos Romero Barceló, Governor of Puerto Rico, in harmony with the provisions of the Electoral Law, sought the pertinent advice from the Commonwealth Elections Commission with regard to the date to hold the By-Election, as well as any other technical information of an electoral nature related thereto.

WHEREAS: The By-Election to fill said vacant office shall be held no later than ninety (90) days after the date of the call, and the person elected in such By-Election shall hold office until the term of his predecessor has expired.

WHEREAS: In a Special Session held on Friday, February 20, the Commission agreed to set the By-Election of Representative District No. 31, for May 24, 1981.

WHEREFORE: I, Carlos Romero Barceló, Governor of the Commonwealth of Puerto Rico, in the use of the authority vested in me by the Constitution and by the Electoral Law of Puerto Rico, do hereby call a By-Election in Representative District No. 31, in order to elect the Representative for said District, constituted by Caguas Precinct No. 86, among all the Electors within the geographic district comprised within Caguas Precinct No. 86, to be held on Sunday, May 24, 1981.

On March 3, 1981, the Popular Democratic Party (hereinafter P.D.P.) filed the present action requesting the Court,

> ... to determine that only candidates and electors affiliated to the Popular Democratic Party can participate in the by-election to be held to fill the vacancy left in Representative District No. 31 as a result of the death of Representative Ramon Muñiz, and to issue an Order of Injunction enjoining any other candidates or electors who are not members of the Popular Democratic Party from participating in said by-election, and to issue any other pronouncement pertinent at law.

On March 6, 1981, the defendants, the Governor of Puerto Rico, and the General Administrator of Elections answered the complaint accepting most of the allegations of fact and objecting to the granting of the remedy sought.[1] On that same date, a group of electors of Representative District No. 31 who were not affiliated to the P.D.P. filed a Motion for Intervention raising objection to the contentions brought by the P.D.P.

The case was called for hearing on March 9, 1981, and the parties acquiesced to the electors' intervention. Since there was no real controversy over the instant facts, the parties submitted the case on documentary evidence attached to the complaint, and a certificate submitted by the defendant Hon. Carlos Romero Barceló. Since the parties raised no objections, the

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[1] Due to the importance of this matter, the Court reduced the terms to answer.

hearings for Preliminary and Permanent Injunction, and for Declaratory Judgment, were joined. After hearing the oral arguments of the counsels, the case was taken under advisement.

The issue here is to decide whether, pursuant to Sec. 8, Art. III, of our Constitution,[2] and to arts. 5.006 and 5.007 of the Puerto Rico Electoral Law, 16 L.P.R.A. §§ 3206 and 3207,[3]

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[2] "The term of office of Senators and Representatives shall begin on the second day of January immediately following the date of the general election on which they shall have been elected. If a vacancy occurs in the office of Senator or Representative for a district, such vacancy shall be filled as provided by law. When the vacancy occurs in the office of a Senator at Large or a Representative at Large, the presiding officer of the appropriate house shall fill it, upon recommendation of the political party to which belonged the Senator or Representative causing the vacancy, with a candidate selected in the same manner as that in which his predecessor was selected. A vacancy in the office of a Senator or Representative at Large elected as an independent candidate, shall be filled by an election in all districts. [As amended by the voters at a referendum held Nov. 3, 1964.]"

[3] Said articles provided that:

"When a vacancy occurs in the office of a senator or representative elected as an independent candidate for a district, or when a vacancy occurs in the office of senator or representative for a district, nominated by a party before the fifteen (15) months immediately preceding the date of the following general election, the Governor, with the advice of the Commission shall, within the thirty (30) days following the date on which the vacancy occurred, call a by-election in such district which shall be held no later than ninety (90) days after the date of the call, and the person elected in such by-election shall hold the office until the term of his predecessor has expired.

If within sixty (60) days following the date such vacancy arises, the party to which the legislator of the vacant office belonged has not presented a candidate to fill such office, the office shall be deemed to be that of an independent legislator, to the effects of holding the by-election to fill it.

In the event the vacancy is that of an independent candidate, any elector affiliated to a political party or duly qualified as an elector, who fulfills the requirements of such office, may be presented as a candidate in said election.

Whenever a vacancy occurs in the office of a senator or representative-at-large who had been nominated by a party, or when, within the fifteen months preceding a general election a vacancy occurs in the office of senator or representative of a district, it shall be filled by the President of the proper Body by nomination of the political party such senator or representative belonged to, with a person selected in the same manner as his predecessor."

"All electors entitled to vote within the geographic district in which the by-election is to be held, pursuant to the call issued by the Governor to such effect, shall vote in a by-election."

only candidates and electors affiliated to the P.D.P. are entitled to vote in the by-election. We must also decide whether the vacant seat belongs exclusively to the political party which nominated the legislator or, contrariwise, if all the qualified electors of the district are entitled to cast their vote in said election, whether for a candidate nominated by the party or for an independent candidate.

In his opinion of February 12, 1981, the Secretary of Justice proposed the following proceeding to be followed in the by-election to be held on May 24, 1981:

a- The Governor, with the advice of the Commission calls, within the thirty days following the date on which the vacancy occurs, a by-election in the district affected by the vacancy. Said election shall be held no later than the ninety days following the date of the call but not before the sixty days following the date when the vacancy occurred.

b- If within the sixty days following the date of the vacancy the party to which the legislator of the vacant seat belonged has not presented a slate to fill the same, the office shall be deemed to be that of an independent legislator, and any elector affiliated to a political party or any duly qualified elector may be presented as a candidate in the election.

c- If within the sixty days the party to which the legislator who caused the vacancy belonged presents a slate, no other elector may be presented as candidate to represent a political party different from that to which the legislator of the vacant seat belonged. Nevertheless, any duly qualified elector may be presented as candidate in the election even if he does not belong to the political party to which the legislator of the vacant seat belonged. In said case, said elector shall be presented as an independent candidate.

d- The Governor, pursuant to the provisions of art. 5.007 of the Electoral Law shall call all the electors of the geographic district where the election is held, without restricting the participation of the electors duly qualified as such.

In my opinion, the aforesaid construction establishes the correct sense of justice behind the provisions of the Electoral Law in question.

In order to have a total view of the issue at bar, it is necessary to become familiar with the legal provisions in force since 1902.

Article 209 of the Political Code of 1902 established that whenever a vacancy occurred at the House of Delegates, "the Governor must at once issue a writ of election to fill such vacancy, and at least eight days notice of such election shall be given."

Article 30 of the Organic Act of 1917 (Jones Act), provided:

"In case of vacancy among the members of the senate or in the house of representatives, special elections may be held in the districts wherein such vacancy occurred, under such regulations as may be prescribed by law."

This procedure was in force until June 1, 1938, when the United States Congress amended art. 30 to read, insofar as pertinent, as follows:

"... In case of a vacancy in the office of any senator or representative occurring by reason of death, resignation, or otherwise, the Governor, upon the recommendation of the central committee of the political party of which such senator or representative was a member, shall appoint a senator or representative from such political party to fill such vacancy who shall hold office for the remainder of the term for which his predecessor was elected. ..." (L.P.R.A., Vol. 1, p. 91.)

When the Constitution of 1952 was being drafted and considered, the Legislative Commission deemed it necessary to change the system for filling legislative vacancies. To this effect, its report reads:

With regard to the manner of filling vacancies, the Commission deems that the democratic guarantees would be greater if an election is required to fill them. Political parties are necessary and desirable instruments in the democratic function, but they should not assume duties which lie with the people. Hence, it is convenient that, as far as possible, it be the people who fill the vacancies through the expression of the will of its voters.

Bearing this principle in mind, the Commission recommends that whenever a vacancy arises in any district, it shall be the Governor's duty to call a by-election in said district within the thirty (30) days following the date such vacancy occurs. The by-election shall be held within ninety (90) days after the call is issued, and the person elected shall hold office until the term of his predecessor has expired. There are three circumstances under which we do not recommend by-election: (a) the first one, whenever the vacancy occurs only fifteen months or less prior to the next general elections, due to the fact that, if the Governor has thirty days to call it and the term for holding it may be extended to ninety (90) days, the tendency would be to offer the whole term to the electoral agencies and to the political parties to hold the by-election.

In that case, the elections would be held during the last year of the term of the Legislative Assembly and the result would tend to show the thoughts of the electoral body at the next elections. It seems unfair to us that after having been commanded to enforce a program, a legislative assembly be hampered during its last year in office by new issues disturbing the public opinion. (b) The second one, when the vacancy occurs during a legislative session, or when the Legislative Assembly or the Senate are called before the date when the results of the by-election are certified. In this case, there is the possibility that the political party to whom the legislator who left the vacancy belonged need that he represents said party immediately after the vacancy is produced and before his successor is elected. Therefore, it is convenient that a provisional appointment be made until the result of the by-election points to a successor, who may belong to a different political party. (c) The third, whenever there is a vacancy in the office of senator or of representative-at-large. We have stated before that one of the reasons behind the creation of a reasonably high number of seats-at-large in each house is to guarantee representation to minority groups. It is unfair that when there is a vacancy in the office of a minority legislator elected at-large, the electors of his party run the risk of losing representation when the total majority vote concentrates on only one candidate. However, in this case as well as in the first one, the Commission

understands that a vacancy should be filled by a person selected in the same manner as his predecessor.

Although, as we have stated above, political parties are an indispensable instrument of democracy, our electoral laws have always acknowledged independent slates, and, bearing in mind that the citizens cannot be deprived of the opportunity to elect at a given moment candidates who do not belong to any political party, it has been recommended that whatever vacancies may occur in the office of a legislator thus elected, be filled through a general election.

After the proposal was considered and approved, it was finally approved as follows:

The term of office of Senators and Representatives shall begin on the second day of January immediately following the date of the general election in which they shall have been elected. If, prior to the fifteen months immediately preceding the date of the next general election, a vacancy occurs in the Office of Senator or Representative for a district, the Governor shall call a special election in said district within thirty days following the date on which the vacancy occurs. This election shall be held not later than ninety days after the call, and the person elected shall hold office for the rest of the unexpired term of his predecessor. When said vacancy occurs during a legislative session, or when the Legislative Assembly or the Senate has been called for a date prior to the certification of the results of the special election, the presiding officer of the appropriate house shall fill said vacancy by appointing the person recommended by the central committee of the political party of which his predecessor in office was a member. Such person shall hold the office until certification of the election of the candidate who was elected. When the vacancy occurs within fifteen months prior to a general election, or when it occurs in the office of a Senator at Large or a Representative at Large, the presiding officer of the appropriate house shall fill it, upon the recommendation of the political party of which the previous holder of the office was a member, by appointing a person selected in the same manner as that in which his predecessor was selected. A vacancy in the office of a Senator

at Large or a Representative at Large elected as an independent candidate shall be filled by an election in all districts. Article III, Sec. 8, Constitution.[4]

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[4] Considering the importance given to it by the plaintiff, it is necessary to cite for the record the Explanatory vote of Atty. Cruz Ortiz Stella, who expounded his objections and preoccupations as follows:

"I have voted against section six of the legislative proposal filed for a second reading by the Commission on Drafting, Style, and Enrollment, and the reasons therefor are the following:

I deem that it would be dangerous for the political tranquility of Puerto Rico to fill legislative vacancies through the holding of elections. Since the Jones Organic Act was amended in 1938, while Hon. Santiago Iglesias Pantín was Resident Commissioner for Puerto Rico in Washington, legislative vacancies have been filled through appointments by the Governor on proposal of the central body of the party to which the lawmaker who died or resigned belonged.

The Constitution of the State of Maryland provides that vacancies be filled by appointment. In Vermont vacancies are filled in the same manner as provided by a law to that effect.

Pursuant to the section examined in this explanatory vote, if there is a vacancy in the office of senator for a district, elections would have to be held in all the towns of that district with the participation of all the existing political parties; this means effort, political campaign, money and energy spending to fill a vacancy in the office of senator. Probably the person who wins does not belong to the political party to which the district senator who died or resigned belonged, and it could happen that a senatorial district would have two senators belonging to different political parties.

The filling of legislative vacancies through the polls has the elements of a recall, and the public opinion in Puerto Rico has always been against the recall. Why do I say this? Well, simply because to ask the people to decide who is going to fill the vacancy means to give the people the opportunity to reverse the mandate it has already given to the party to which the legislator who caused the vacancy belonged. I think that once the people has given a mandate for the next four years, it should not be empowered to reverse it. To my mind, this is very dangerous for the good operation of democracy. In a few years, it may happen here in Puerto Rico that the party in power has a majority of one in any of the houses. Well, if there is a vacancy in that house in the office of legislator formerly held by an affiliate of the party in power, the elections to be held in order to fill the legislative vacany [sic] could make the party in power lose control of that house, and this would lead the government of Puerto Rico into chaos. The guarantees of legislative representation given to minority groups by this proposal, which also includes the section examined in this explanatory vote, could prove ineffective in the

(footnote continues)

Act No. 20 of August 22, 1952, 16 L.P.R.A. § 441 *et seq.* was approved in order to implement the constitutional provision. Its sec. 1 provided:

When a vacancy occurs in the office of Senator or House Representative for a district before the fifteen months immediately preceding the date of the following general election, the Governor shall, within the thirty days following the date on which the vacancy occurred, call a by-election in such district, which election shall be held not later than ninety days after the date of the call, and the person elected in such by-election shall hold the office until the term of his predecessor has expired. Whenever a vacany [sic] occurs in the office of Senator at Large or Representative at Large, it shall be filled by the presiding officer of the corresponding House on proposal of the political party to which the Senator or Representative whose position is vacant belonged, with a candidate chosen in the same manner as his predecessor was chosen. A vacancy in the

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(footnote continued)

future. It could happen that a minority party has only one legislator in a house. Once that office is vacant, elections would have to be held to fill it, and it is possible that such minority party could lose the elections hence being deprived of any representation in said house.

I maintain that the filling of vacancies through election tends to enhance local caciquism. It has been a long time now since the people of Puerto Rico has been voting for programs or ideas, and not, in essence, for persons. Let us imagine that a vacancy has occurred in the office of representative elected by only one municipality. Let us imagine further that the vacancy was produced four months after the general election. According to section six of the legislative proposal, elections would have to be held in said municipality. Each party could nominate its candidates. For what would the people in the municipality be voting in those by-elections? I think that in those elections the people would not be voting for any kind of program because they voted for that four months before. In those by-elections, the people would only be voting for persons, for names, and I think this is very bad for democracy. The winning candidate in those by-elections would think that they were not won by his party but by him alone, and this would encourage his feelings of local political caciquism.

In behalf of history, I would like that my position be made part of the record. I hope that my forebodings never come true, but I wanted to vent my conscience stating the reasons that move me to vote against section six of the legislative proposal."

office of Senator at Large or Representative at Large elected as an independent candidate shall be filled by an election in all the districts.

Its section 2 provided as follows:

There shall be entitled to vote in such by-election all voters appearing in the poll lists used in the immediately preceding general election in such district, or in all of Puerto Rico, in case the vacancy to be filled is one of Senator or Representative at Large elected as independent candidate.

Pursuant to sec. 5, 16 L.P.R.A. § 445, any principal political party or any party by petition was entitled to nominate candidates to fill the vacancy.[5]

During the 1964 Ordinary Session the Conc. R. No. 12 of the H. was presented to propose an amendment to Sec. 8, Art. III with regard to the manner of filling legislative vacancies. The proposal read:

"Whenever there is a vacancy in the office of Senator or Representative for a district, said vacancy shall be filled in the manner provided by law. When there is a vacancy in the office of Senator or Representative-at-Large, it shall be filled by the chairman of the corresponding house, on proposal of the political party to which the Senator or Representative whose office is vacant belonged, with a candidate selected in the same manner as that in which his predecessor was selected. The vacancy in an office of Senator or Representative-at-Large elected as independent candidate, shall be filled by holding an election in all districts." 17 *Diario de Sesiones* 1162 (1964).

According to the report of the House Committee on Elections and Personnel, the purpose of the measure was the following:

From the moment the Constitution took effect in 1952 until the present time, there have been four vacancies in the office of Representative for a district on dates which were not within the fifteen months prior to a general election. Hence, previous

[5] This law was very detailed because it covered all aspects of the elections. 16 L.P.R.A. §§441-492.

experiences constitute sufficient ground to pass on the need and convenience of the method prescribed by the Constitution to fill such vacancies.

According to the Committee, it has been amply shown that the holding of a local by-election in the above-mentioned cases is an unduly burdensome requirement which forces the Commonwealth to incur great expenses to defray it while also forcing the political parties lo [sic] launch political campaigns which greatly diminish their economic resources. And we cannot say that the positive aspects offered by this method can balance the inconveniences and negative extent of such elections.

The Committee believes that the most adequate manner of dealing with this matter in the Body of the Constitution is to direct the Legislature to statutorily provide a method to fill the vacancies which may occur in such cases.

The Chairman of the Committee reported the following:

House Concurrent Resolution No. 12 is directed to submit before the People of Puerto Rico during the next general elections, an amendment to Sec. 8, Art. III, of the Constitution of the Commonwealth of Puerto Rico so that, in case that a legislator dies, as it has happened before, it be unnecessary to hold a by-election as we have done up to now. In its stead, the vacancy in the office of legislator may be filled as provided by law, as it is stated in the above-mentioned Concurrent Resolution.

Mr. Chairman, experience tells us that the approval of the measure would be justified to the end of preventing what has been happening whenever a legislator dies, specially regarding the expenses incurred by the parties which participate in the general election and some other inconveniences which, we must confess, and as experience tells us, that it would be convenient to submit this amendment to the Constitution to the People of Puerto Rico at the next general election so that, if it has the approval of the People, legislation may be enacted in whatever manner the Legislature of Puerto Rico deems best.

During the debate there was the following interchange which we deem is very important.

Mr. Ramos Barreto: Mr. Chairman, it seems that the colleague did not understand the question. What I ask is if, for example, the Popular Democratic Party, well I do not think this is going to happen but, if in the future it breaks up into two different groups, if the forces are divided in two, and one of the candidates dies, how would the candidate be selected if each group is claiming said candidate?

Mr. Chairman: In that sense, the Resolution is clear; it will be as the Legislature provides by law. We are not debating the law. We are debating the proposed amendment to the Constitution. And, according to it, it shall be as the Legislature of Puerto Rico provides by law.

Mr. Meléndez Báez: I had already explained that.

Mr. Ramos Barreto: Very well.

Mr. Rivera Morales: Mr. Chairman.

Mr. Chairman: Mr. Representative.

Mr. Ramos Barreto: Mr. Chairman.

Mr. Rivera Morales: If the colleague has finished, I would like to ask some questions.

Mr. Chairman: Yes; excuse me but Mr. Representative has the floor.

Mr. Ramos Barreto: Mr. Chairman, I have another doubt, another question.

Mr. Chairman: Go ahead.

Mr. Ramos Barreto: If, for example, certain party wins in a certain District X and, later on, that candidate dies. Don't you think that this amendment could deprive a candidate of another party from winning a primary after the elections because the situation might change?

Mr. Meléndez Báez: Well, to be frank, I confess that I cannot answer that question because, according to my interpretation of the law and of the amendment we are trying to approve through the Resolution, the definition is already there, and, as it was correctly stated by Mr. Chairman of the House,

that is already foreseen by the very Resolution, insofar as, when this happens, it is going to be filled through the legislation approved after the People of Puerto Rico approve the amendment in the general election.

Mr. Chairman: Any other question?

Mr. Rivera Morales: I would like to ask some questions to colleague Meléndez Báez.

Mr. Chairman: Mr. Rivera Morales.

Mr. Rivera Morales: The first question is: Does this amendment serve the purpose of allowing the central body of the party to whom the Senator or Representative who caused the vacancy belonged, to fill such vacancy, instead of holding a by-election?

Mr. Meléndez Báez: No, no, no, colleague. This would be as determined by law. *Diario de Sesiones* 1964, pp. 1162-1163.

On April 24, 1964, the House approved the Resolution without amending it, *Id.* at 1186.

When the Special Committee appointed to examine the measure appeared before the Senate to render its report, it recommended some stylistic amendments, *Id.* at 1223. In its report it stated:

On the other hand, the above-mentioned constitutional provision also establishes that when there is a vacancy in the office of Senator or of Representative-at-Large, it shall be filled by the chairman of the corresponding house on proposal of the political party to which the Senator or Representative whose office is vacant belonged, with a candidate selected in the same manner as that in which his predecessor was selected. Hence, insofar as the offices of Senator or Representative-at-Large are concerned, as well as with regard to the offices of Senator or Representative for a district whenever there is a vacancy within the fifteen months preceding the following general election, the Constitution recognizes the political parties' legitimate responsibility which results from the election of one of its candidates to hold such offices: that is to say, it lays down the principle that it is incumbent upon the political party to which the Senator or

Representative whose seat is vacant belonged to propose a new candidate for said seat. The purpose served by the Conc. R. No. 12 of the House is to allow the Legislature, through legislation to that effect, to adopt a similar procedure to fill the vacancies in the offices of Senator or Representative for a district, or any other method as may be satisfactory.

Naturally, any law adopted by the Legislature to this effect shall provide for the cases when the vacancy to be filled does not correspond to a candidate elected by a political party, but to an independent candidate. In that case, the method adopted will have to be different from the method of making the appointment based on the proposal of a political party.

During the debate the following statements were made:

Mr. García Méndez: Mr. Chairman, I asked the question because, otherwise, I would be accepting the Committee's amendments when what I want to do is to propose a small variation. So, I want to ask the distinguished colleague what is the true spirit on which it is predicated, the true purpose of the amendment. Is it or isn't it the same or a similar procedure leading to the same results as that followed for the appointment of substitute Senators-at-Large, or of those who, according to the present constitutional provision, cause a vacancy during the fifteen months preceding a general election? Is the spirit of the amendment that it be incumbent upon the political collectivity to whom the member who caused the vacancy belonged to make the proposal?

Mr. Negrón López: Mr. Chairman, I answer the question explaining that in both the drafting and the transaction of this proposal for constitutional amendment, the spirit is that there be no changes in what has been the will of the electorate when filling the office where the vacancy has occurred.

Mr. García Méndez: Then, Mr. Chairman, I am going to request the Senate's unanimous consent so that once the amendments made by the Special Committee are approved, I be permitted to propose an additional amendment, in order to clarify the language of this report.

This is not, as we have always accepted, the normal way of amending a report, but if there is a unanimous consent, it is preferable to make it in order to avoid the delay entailed by returning it to the Committee for further amendments. Hence, I request a unanimous consent for this purpose.

Mr. Negrón López: Mr. Chairman, I understand that none of the senators shall raise objection to the unanimous consent requested by the Speaker of the Minority.

Now, regarding the amendments proposed in the report, I moved for approval and no vote has been taken on this yet. It would be convenient to approve the amendments to the report now.

After being voted on, the amendments contained in the report of the Conc. R. No. 12 of the House are approved.

Mr. García Méndez: Mr. Chairman, then we propose . . .

Mr. Ortiz Stella: Mr. Chairman, I think that the amendment should go first, although I have no objections, an amendment with which the colleague was already familiar. It is more a language amendment. It is at the first page, Sec. 8, line 6, in order that the following be deleted: "pursuant to the method that," in order to insert "as provided." It would read: "Said vacancy shall be filled as provided by law."

That would be the amendment, Mr. Chairman.

A vote was taken, the aforesaid amendment was approved.

Mr. García Méndez: Mr. Chairman, we then propose that the following amendment be added in the first paragraph of the report, at the end of page 4, after it says "by the districts," line 8, to place a comma (,) instead of a period (.), and that the following be added: "always guaranteeing that the responsibility and the right to propose a substitute shall lie with the Party to which the Senator or Representative who caused the vacancy belonged."

The purpose of the amendment is to clarify the language of the report in order to make clear for the record that the spirit of

this amendment is, precisely, that it be through the recommendation of the Party to which the senator or representative who caused the vacancy belonged.

I am well aware of the fact that, at present, my amendment favors, if there was more time but there isn't because we have less than fifteen months, but if this amendment would have been made the first year after the last elections or on the second year after the 1960 elections, in fact I would have been favoring the position of the senators and representatives of the Majority who would therefore be entitled to be candidates for substitution because in the last election my party did not directly have district senators or representatives; but, as a matter of principle, I think that a directly elected senator or representative has not been elected for one or two years, but for four, and whether or not this is convenient, the principle is that there should be a substitute representing the person who was elected by the party with the purpose that such person held the seat for four years. In the second place, at this point we do not know what changes may come from the next election, and it seems to me but fair that it be like this not for some but for all the parties, I mean, that the substitute senator or representative be appointed by recommendation of the party which won the seat. I have said this as an explanation which must appear in the record, an interpretation of the spirit of the amendment.

Mr. Amadeo: Mr. Chairman, I would like to say two words with regard to what the colleague has said.

Mr. García Méndez: Mr. Chairman, upon making the amendment by addition, I forgot that the last phrase was deleted, but I did not say it. So, I ask that it be deleted.

Mr. Amadeo: Mr. Chairman, in some Constitutions, particularly in those of Latin America, there are substitute legislators, so that first the main candidate is elected, and then his substitute. If the first one resigns or dies, then, the substitute has also been elected by the people. I think that is more democratic, that a party nominates the candidate. That is to say, there should be a substitute candidate who shall hold office if the main candidate resigns or dies. This is the constitutional practice in other countries.

A vote was taken on the amendment proposed by Mr. García Méndez and it is approved.

When the Resolution returned to the House, Mr. Representative Alvarado explained the following:

Mr. Alvarado: Concurrent Resolution No. 12 of the House, to which the Secretary has made reference, provides for a constitutional amendment regarding vacancies in the Legislature. The amendments to this measure which have been proposed by the Senate all deal with the style. Where we said "It shall be decided by the House and the Senate of Puerto Rico in legislative concurrence," well the Senate states: it shall be decided by the Legislative Assembly; where the House said: "said vacancy shall be filled pursuant to the method provided by law," the Senate states: "said vacancy shall be filled as provided by law." The language of sec. 3 has been changed, although the end result is the same obtained by the language proposed by the House. Where we said: "The amendment proposed in Section one of this Resolution shall take effect as soon as the Governor of the Commonwealth of Puerto Rico so proclaims once the General Supervisor of Elections certifies that the same has been ratified by a majority of the electors who voted on said amendment, and, to that effect, it is provided that the General Supervisor of Elections shall send said certificate to the Governor no later than forty-eight hours after the general cavass [sic] on said amendment has been finished, and the Governor's call shall be issued no later than thirty days after said certificate has been received." The Senate amends this text to read: "The amendment proposed in the First Section of This Resolution shall take effect as soon as the act providing the method to fill a vacancy in the office of Senator or of Representative for a District becomes effective, if the said amendment had been already ratified by a majority of the electors who had voted on the same in the special referendum mentioned in Section 2 of this Resolution."

I propose that we concur with the amendments of the Senate.

Mr. Chairman: Those in favor of concurring with the amendments of the Senate. (A vote is taken on the motion, and it is approved.)

Mr. Chairman: Concurrence is approved. *Id.* at 1300.

The constitutional amendment was endorsed by the voters in the 1964 general election. Senate Bill No. 118, which became Act No. 91 of June 26, 1965, 1 L.P.R.A. 26-27, was approved in the legislative session of 1965. This bill was approved without debate and without any Committee Reports. The act established the following method:

Section 1. Whenever a vacancy occurs in the office of Senator or Representative for a district, said vacancy shall be filled by the presiding officer of the corresponding house, on proposal of the political party to which belonged the Senator or Representative whose office is vacant, with a candidate selected in the same manner as his predecessor was, except: (a) when the vacancy occurs within the twelve months immediately preceding the date of the next general election, in which case the office shall be filled with the person recommended by the central directing body of said party, and (b) when the vacancy occurs in the course of a legislative session or when the Legislative Assembly or the Senate are called to convene on a date prior to the recommendation of the political party to which said Senator or Representative belonged, in which case the office shall be filled with the person recommended by the central directing body of the party concerned, to hold office until the recommendation of the candidate selected as above provided is certified.

Section 2. Whenever before the fifteen months immediately preceding the date of the next general election, a vacancy occurs in the office of Senator or Representative for a district, elected as independent candidate, the Governor shall, within the thirty (30) days next following the date on which the vacancy occurred, call a by-election in said district, which shall be held not later than ninety (90) days after the call, and the person elected at said by-election shall hold the office until expiration of the term of his predecessor. If such vacancy in the office of Senator or Representative for a district, elected as

independent candidate, occurs within the fifteen months immediately preceding the date of the next general election, said office shall remain vacant until expiration of the term for which the incumbent was elected.

Note that due to a presumably involuntary omission Act No. 20, 16 L.P.R.A. § 441, *supra,* which contained a totally different method, was not repealed. This legislative error was not officially corrected until the Electoral Code was signed into law. Article 10.016, Act No. 1 of February 13, 1974, Laws, p. 100. The Electoral Code of 1974 left Act No. 91, *supra,* in force. It was repealed through art. 8.036 of the present law.

The legislative debate of the new Electoral Law is very sparse with regard to the system for filling vacancies. As part of a great number of amendments submitted by P.D.P. representatives, Senator Juan Cancel Ríos proposed that the totality of Act No. 91 be left in full force.[6] This proposal, as well as all the others submitted by the P.D.P., were defeated. (31 *Diario de Sesiones* 260 (1977).) Citing the original sec. 8 of the 1952 Constitution, and Act No. 91, the proponent of the defeated amendment argued that a seat which is vacated belongs to the party. His main objection was against the method established in the second paragraph, according to which if the party did not present a slate within the 60 days following the date of the vacancy, the seat would be deemed as that of an independent candidate. Senator Cancel Ríos argued that this procedure would turn the seat from one belonging to a party into an independent seat. He contended that if only thirty days were given to the party to fill the seat through primaries and the party failed to present a candidate, anybody could run for office and all parties could participate in the process. In that case, the party which won the seat at the elections would run the risk of losing it to another party or to an independent candidate. The questions of Senator Oreste Ramos, the measure's advocate, were only meant to clarify the construction of the second paragraph, that is, what would happen if a slate was not

[6] We refer to the transcript of the Senate debate submitted by the P.D.P. We shall not copy it in full because it is lengthy and difficult to read (it covers from p. R17-2 to R-19-6).

presented within the 60 days following the occurrence of the vacancy. Mr. Cancel Ríos stressed his position at the formal debate:

Mr. Chairman, yesterday we raised some very delicate constitutional issues. Our distinguished colleague Chairman of the Commission, distinguished young man, brilliant attorney, I know him personally, asked me a series of questions with regard to said measure. I ask him again to reflect, I ask him again that before a vote is finally taken on this project the Secretary of Justice be required to make a study in depth, not the superficial thing we have received with regard to this measure which creates a serious confusion as to one very important thing: the candidates to fill vacancies in the offices of representative or senator for a district, representative or senator at large, or independent candidates. I know that Mr. Chairman, who I hold in great esteem, must be worried about these issues because there is a serious confusion regarding the constitutional provision, which regulates all matters related to vacancies caused by these officers, and the provisions of this law, which reverse an act of 1965 approved within the spirit and the letter of the Constitution and this project reverses the 1965 act and we think and contend that said part of the project is unconstitutional. *Diario,* 1977, p. 225.

Senator Ramos answered as follows:

What other amendments have been proposed by the colleagues? Yesterday colleague Juan Cancel Ríos was saying that what the project proposed for the substitution of Senators or Representatives whose offices are vacated due to resignation or disability was unconstitutional. Colleague Juan Cancel Ríos was saying that it was unconstitutional, and I asked him several questions to see if what was proposed was really unconstitutional, and since colleague Juan Cancel Ríos was annoyed by this, which is rather strange in him, we went to the pertinent legal source and obtained the following text of Art. 3, Sec. 8 of the Constitution of Puerto Rico: "Terms of office; vacancies. The term of office of Senators and Representatives shall begin on the second day of January immediately following the date of the general election on which they shall have been elected. If a vacancy occurs in the office of Senator or Representative for a

district, such vacancy shall be filled as provided by law." Well, if it shall be as provided by law, and what we are proposing is a law, how can it be unconstitutional that we legislate if the very constitution forces us to do so. *Id.* 245.

That is precisely the question we must first of all decide, to wit, whether the legislature was empowered to change the system established by Act No. 91, or if, on the contrary, the 1964 constitutional amendment restricted future legislatures from returning to the previous system of filling the vacancies through elections held between party and independent candidates. If the lawmaker's intention in approving secs. 5.006 and 5.007 of the present law was to fill vacant seats by holding by-elections, he was obviously empowered to change the previous mechanism. We explain ourselves.

As we have seen, from 1902 to 1938 vacancies were filled by holding by-elections. From 1938 to 1952 a successor was appointed on proposal of the political party to which the predecessor belonged. From July 25, 1952, to June 26, 1965, the by-election system was used where candidates of all parties and independent candidates could participate. When Sec. 8 was amended, the lawmaker was empowered to chose whatever system he deemed necessary. The phrase "as provided by law" can have no other meaning than that. Although it is true that Senators Negrón López and García Méndez stated that the spirit was "that there be no changes in what has been the will of the people when filling the office where the vacancy has occurred," and that the Committee's Report was amended to reflect that the purpose was that the party should make the recommendation, the text of the proposal was neither amended nor corrected. If the intention was that said system would have constitutional rank, it would have been easy to include it in Sec. 8 using a language similar to that used later on in Act No. 91, *supra*. Note that in the House debates it was stated that the purpose of the measure was to make by-elections unnecessary, due to economic and others [sic] reasons. Contrary to the P.D.P. contentions, there is no evidence whatsoever that the House knew, considered, or approved the Senate's alleged intention. On the contrary, it only understood that the Senate's amendments were only stylistic. See the statements of Mr.

Alvarado, *op. cit.*, at 1300. It is well known that when a law is clear there is no need to resort to extraneous sources in order to construe it. *Irizarry* v. *Registrar*, 61 P.R.R. 70 (1942), art. 14 of the Civil Code, 31 L.P.R.A. §14; *Rodríguez Rodríguez* v. *Governor*, 91 P.R.R. 95 (1964). On the other hand, if the lawmakers' statements and interpretations are not included in the text of the law, whenever there is a conflict between both, the clear text of the statute or constitutional provision must prevail. See *F. Vázquez, Inc.* v. *Secretario de Hacienda*, 103 D.P.R. 388 (1975). The only reasonable construction which we can make of Sec. 8, as amended, is that future legislatures have ample power to chose such system as they understand is most just, democratic and feasible within the circumstances prevailing at a given moment. Act No. 91 of 1965 established the system of filling the vacancies on proposal of the party, which remained in force until the approval of the Electoral Law of 1977, particularly arts. 5.006 and 5.007, 16 L.P.R.A. §§ 3206, 3207, was enacted.

The Informative Motion filed by the Administrator makes the following recount of how vacancies were filled from 1952 up to the present:

1. In compliance with an Order issued by the Honorable Court on March 3, 1981, we furnished the following information to the Hon. Court:

A- On February 10, 1963 a By-election was held to fill a vacancy in Representative District No. 28. The candidates were Mr. Jaime Rullán Mayol for the P.D.P., and Luis Becerra for the S.R.P. Mr. Jaime Rullán Mayol was elected. (Exhibits III and IV of the General Administrator of Elections.)

B- On February 11, 1962 a By-election was held to fill a vacancy in Representative District No. 28. The candidates were Mr. Miguel A. Morciglio for the P.D.P., and Mario Ramos Antonmattei for the S.R.P. Mr. Miguel A. Morciglio was elected. (Exhibits I and II of the General Administrator of Elections.)

C- On January 11, 1970 the P.D.P. held a primary to fill a vacancy in Senatorial District No. 8 (Humacao). The candi-

dates were Messrs. Enrique Calderón, Justion Díaz Santini, Plácido Figueroa Rodríguez, Rafael Lastra, Jr., Gilberto Rivera Ortiz, Ramín Rivera Valentín, Enrique Sánchez Cappa, and Carlos Sanjurjo Monge. Mr. Gilberto Rivera Ortiz was elected. (Exhibit V of the General Administrator of Elections.)

D- On September 13, 1970, the Popular Democratic Party held a Primary to fill a vacancy in Senatorial District No. 7. The Candidates were Messrs. Edwin Bello and Rafael Martí. Mr. Edwin Bello was elected.

E- We have found that from January, 1973, to December 1976 neither the Electoral Tribunal nor the Commonwealth Elections Commission held any electoral event to fill legislative vacancies.

F- On October 29, 1978, a By-election was held to fill the vacancy left by N.P.P. ex-representative-at-large Hon. David Urbina. The candidates were Messrs. Peter Kryzanowski and Segundo Viera Estrada. Mr. Peter Kryzanowski was elected.

G- On April 12, 1978, the General Administrator of Elections certified Mr. Luis A. (Wito) Morales as Popular Democratic Party Senator at large at the request of Atty. Héctor Luis Acevedo, Electoral Commissioner of the P.D.P., through Motion of April 10, 1978. Hon. Luis A. (Wito) Morales filled the vacancy left by ex-Senator at large Hon. Enrique A. Vicens. The Commonwealth Elections Secretary also requested the certification of said Candidate because, as he alleged, Mr. Luis A. (Wito) Morales was the only aspirant who had met the statutory requirements, and the deadline set by the Commission *for filing* endorsement petitions had already expired. (Exhibits VII, VIII, and IX of the General Administrator of Elections.)

H- On October 8, 1979, the General Administrator of Elections certified Hon. Salomón Rondón Tolléns as Representative for Representative District No. 40. Mrs. Lydia Ibarra, who also aspired to that office, did not meet the required amount of endorsement petitions for Precincts No. 112 of San Juan and No. 113 of Guaynabo. Mr. David Cardona Molina also filed his nomination, but did not file any endorsement petitions. (Exhibits X to XV of the General Administrator of Elections.)

I- On March 31, 1978, the General Administrator of Elections certified Hon. José Enrique Arrarás as Representative at large to fill the vacancy left by Atty. José (Pincho) Izquierdo. The Under-secretary of the Commonwealth Elections Commission Mr. Rafael A. Miranda Larrauri recommended the certification of Hon. José Enrique Arrarás through a Motion of March 31, 1978 where he stated that Hon. José Enrique Arrarás was the only aspirant who met the statutory requirements, and that the deadline set by the Commission to file endorsement petition had already expired. (Exhibits XVI to XX of the General Administrator of Elections.)

In addition to this, two by-elections were held during the fifties under the system established by Act No. 20, *supra.*

The first vacancy in the office of a Representative for a District, under the present law, occurred on June 21, 1979 as a result of the resignation of Alejandro Cruz Ortiz, Representative for Representative District No. 40. On July 20, 1979, the Hon. Governor issued a Call in the matter of: Primaries for Representative District No. 40. Insofar as pertinent it read:

WHEREAS: The former incumbent of the Office of Representative for Representative District No. 40 appeared under the New Progressive Party column in the 1976 general elections.

WHEREFORE: I, Carlos Romero Barceló, Governor of the Commonwealth of P.R., in the use of the authority vested in me by the Constitution and by the Electoral Law of Puerto Rico, do hereby call a primary election to be held on October 14, 1979, in Representative District No. 40, composed of Precincts No. 112 of San Juan and No. 113 of Guaynabo, between candidates affiliated to the New Progressive Party.

On August 1st, 1979, the N.P.P. published an announcement in the newspaper *El Nuevo Día,* informing the following:

WHEREAS: Article 5.007 of the Electoral Law provides that in this kind of cases all the bonafide electors of the New Progressive Party who reside in Precincts No. 112 and No. 113, which constitute Representative District No. 40, shall participate in said election.

WHEREFORE: We hereby notify any aspirant to present his nomination for the abovementioned office and to appear at the Office of the Secretary of the Party from August 1st, 1979, 9 a.m. to August 24, 1979, 12M., Mondays through Fridays, in order to file his nomination.

On October 8, 1979, the Commonwealth Secretary of Elections certified:

1- That on September 17, 1979, Mr. Salomón Rondón Tolléns filed in the Office of the Secretary of this Commission the Application for Acceptance and Oath of Nomination in Primary Elections. (See appendix I).

2- That on September 27, 1979, Mr. Rafael Rodríguez Aguayo, Executive Secretary of the New Progressive Party, certified that Mr. Salomón Rondón Tolléns had met the party requirements to apply for a nomination in a Primary Election. (See appendix II).

3- That on October 5, 1979, Atty [sic] Eugenio S. Belaval notified that Ms. Lydia Díaz Ibarra, the other aspirant for the Vacant Seat of Representative District No. 40, had not complied with the required number of endorsement petitions for Precincts No. 112 of San Juan and No. 113 of Guaynabo. (See appendix III).

4- That the final report of the Office of Validations of the New Progressive Party, dated October 8, 1979, which lists the total number of petitions required, rejected and valid for the two (2) aspirants to nomination, is atached [sic] to and made part of this certificate. (See appendix IV)

5- That at the request of Mr. Salomón Rondón Tolléns, the Commonwealth Secretary of Election, certified that the number of endorsement petitions required by the Electoral Law had been complied with. Said certification includes the formula used to calculate the necessary endorsement petitions. (See appendix V)

6- That since there is only one aspirant for the abovementioned Vacant Office, we respectfully recommend the General Administrator of Elections to certify Mr. Salomón Rondón

Tolléns as Representative for Representative District No. 40, as provided by art. 4.006 of the Puerto Rico Electoral Law.

Please note that the Administration dealt with the by-election to be held as if it were a primary. To that end, it used the procedures and requirements laid down by art. 4.006 of the Act, 16 L.P.R.A. § 3156, which, insofar as pertinent, reads:

(b) Automatic Certification of Other Candidates.- When only one aspirant has met the requirements to participate in the primaries of a specific party for any elective office other than Senator or Representative-at-large, the Commission shall certify said aspirant as the candidate of the party concerned for said office in the next general elections.

In the case at bar it is evident that the Governor has adopted a completely different method. Now, if the party to which the legislator who caused the vacancy belonged presents a slate within the statutory term, no elector representing a different political party may run for office. This notwithstanding, any elector may run as independent candidate. See Opinion of the Secretary of Justice.

What were the reasons behind such a drastic change in the construction of the statute? We shall limit ourselves to discuss and analyze those arising from the documentary evidence before us.

On October 5, 1979, the Commission adopted a Memorandum of Atty. Miguel A. Pagán, the Administrator's Legal Advisor, as its official opinion. Due to its importance, we state its grounds for the record:

1. The political history of the Puerto Rican parties of not meddling in the internal affairs of the other political parties.

2. The Act does not expressly provide what should be included in the Governor's call, and it does not expressly restrict or prohibit the calling of only those candidates belonging to the party, on the contrary, it leaves the door open to limiting the call to the candidates of the party in question. Any conduct not expressly barred by law is permitted. This is a general rule of law.

3. The legislative intent as it appears from a thorough reading of art. 5.006 is that only the candidates affiliated to the party to which the former incumbent belonged and whose office is now vacant, are entitled to vote. The very article leaves the door open to the possibility that an independent candidate be presented within the statutory period.

4. Law cannot seek absurdities, and reason tells us that only the members of the party to which the legislator whose vacant seat prompted the holding of a by-election belonged, are entitled to vote in said by-election, particularly if the party to which the candidate belonged presented candidates within the statutory term.

5. The Governor's convocation was for a primary, and it was thus informed to the people.

6. The People, the voters have traditionally given the name of primaries to these by-elections and they have traditionally understood that only those affiliated to the party to which the legislator whose vacancy prompts the holding of said by-election belonged, are entitled to vote. In our democratic system the government is governed by the will of the people. The will of the people would be frustrated if the article in question is construed in any other way.

7. Apparently, there is a lapsus in the text of art. 5.007 and it seems to contradict the legislative intent behind art. 5.006 of the Electoral Law in force. It would also be contrary to art. 1.002 which provides:

"For that reason, our constitutional mandate also extends express recognition and categorical rights to the political parties . . . . " (Underscore supplied.)

8. The fact that if a vacancy occurs within the 15 months preceding a general election, a by-election would not be necessary. If this matter would have been so critical, the lawmaker would have provided for the holding of these by-elections in every case.

In view of the foregoing, I recommend that Rule 1 of the Draft Regulations for By-Elections be amended in order to add this phrase at the end of the last sentence of the Rule:

"And that only those affiliated to the Party to which the legislator whose vacancy prompts the holding of a by-election belonged, be entitled to vote." (Underscore supplied.)[7]

On October 9, 1979, the Administrator requested an opinion to this effect from the Secretary of Justice. This opinion was never issued. The procedure adopted by the Governor in 1979 and the opinion of the Commission established the effective state of law in our jurisdiction until the vacancy caused by the death of P.D.P. Representative Muñiz. The state of law became ineffective and in its stead a completely different procedure was adopted. Now all the electors of the district, regardless of their affiliation, are entitled to run for office and to vote in a by-election.

The position assumed by the Governor is predicated in the Opinion of the Secretary of Justice's of February 12, 1981. The Secretary analyzes the statute, Sec. 8 as amended, and its legislative history and concludes that the Legislature is empowered to provide the mechanism to fill the vacancies. It has been established that we agree with said interpretation. We deem, however, that his interpretation of arts. 5.006 and 5.007 is not persuasive because it is not reasonably and logically based on the letter of the statute and/or its legislative history.

It should be kept in mind that the interchange of questions and answers between Senators Cancel Ríos and Ramos only dealt with the second paragraph of art. 5.006, that is, the validity and wisdom of granting to the party to which the legislator who caused the vacancy belonged, a term to present a slate, and what would happen if no slate is presented. Although it is true that the P.D.P's proposal that the mechanism of Act No. 91 should be kept in force did not prevail, the debate sheds no light on which would be the procedure to follow. Therefore, we must try to make a rational and logical analysis of the statute in order to discover the true legislative intent.

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[7] During the hearing, Atty. Pagán told us that said Regulations were never promulgated.

The first two paragraphs of art. 5.006 provide:

> . . . the Governor, with the advice of the Commission shall, within the thirty (30) days following the date on which the vacancy occurred, call a by-election in such district which shall be held no later than ninety (90) days after the date of the call, and the person elected in such by-election shall hold the office until the term of his predecessor has expired.
>
> If within sixty (60) days following the date such vacancy arises, the party to which the legislator of the vacant office belonged has not presented a candidate to fill such office, the office shall be deemed to be that of an independent legislator, to the effects of holding the by-election to fill it.

We agree with the opinion of the Secretary in that the first paragraph compels the Governor to call a by-election. We do not agree, however, with his interpretation of the second paragraph. We understand that its effect is completely different from that suggested by the Secretary. The only purpose of including this new method is to fill a gap of the former statutes, to wit, provide for the eventuality that, for whatever reason, the party does not present a slate within the sixty days. Only in this event can the seat be deemed to be that of an independent legislator. If within the legal term the party exercises its right to present a slate, the by-election will be held between candidates and voters affiliated to the party. If the lawmaker's intent would have been that, although the party had presented its slate any elector could run as independent candidate, he would have expressly provided so.[8] It would have been unnecessary to include the second paragraph because, any way, a by-election would have to be held. The only thing we can infer is that he saw the possibility, although clearly remote, that the party may waive its participation in the election. If the intention was to make an open election, why would the right to participate in the election be granted to the majority and not to the minority party? If the real philosophical basis of the present status is that the vacant seat belongs to all the electors and not the winning

[8] Please note that the Electoral Law defines the term "slate" as all the candidates of a political party appearing on the electoral ballot in the column corresponding to that party.

party, why a similar provision recognizing the right of all parties and electors to participate was not included in sec. 5 of Act No. 20 16 L.P.R.A. § 445? We resolve that art. 5.006 does not impair our conclusion that the seat belongs, first of all, to the party. The statute contemplates three different situations which warrant a by-election:

1) whenever a party presents a slate (more than one party candidate) an election similar to that contemplated in the case of District No. 40 in 1979 shall be held;

2) whenever the party does not present a slate, an election between independent candidates;

3) if the vacant seat belonged to an independent candidate, an election between independent candidates.

That is why it is provided that all voters with a right to vote shall do so according to the call. That is, all electors who have a right to vote shall vote depending on the type of election to be held. If it is the first case, only party affiliates shall vote. In the other two instances, all the electors of the district may participate. We really see no conflict between arts. 5.006 and 5.007.

It is true that courts should avoid situations where a literal and strict construction would raise serious constitutional questions and objections. *P.S.P.* v. *Comisión Estatal de Elecciones,* 80 J.T.S. 92, at 1741; *Milán Rodríguez* v. *Muñoz Gil de Lamadrid,* 81 J.T.S. 5; *Negrón Soto* v. *E.L.A.,* 81 J.T.S. 12. But in this case we think that ours is the most logical construction. Although we respect the opinion of the Hon. Acting Secretary of Justice, the opinion of the electoral experts, that of Atty. Pagán and that of the other members of the Commission is much more persuasive. Apart from the respect and deference due to this opinion, because it is contemporary with the promulgation of the statute and because it comes from the administrative body having the primary responsibility of interpreting the Electoral Law, we must point out that, before it was issued, the very codefendant Hon. Carlos Romero Barceló had called a by-election limited to N.P.P. electors of District No. 40. The theory now raised for the first time that said decision was taken because the P.D.P. did not show any interest in participating and did not challenge the call, is untenable at law. The

construction of a statute cannot depend on the ups and downs of politics. The law is only one. That is why we are not persuaded either by the Governor's argument that the seat belongs to all the electors because Representative Muñiz' election was based on split ballots. To constuct a statute based only on the electoral results of a given historical moment would lead us right into chaos.[9] Defendant's unexpressed premise that the election called to elect the Representative for District No. 40 was limited to N.P.P. affiliates because the P.D.P. had no real opportunity to elect its candidate is clearly untenable. We repeat, there can be only one construction of a statute and it cannot depend on political advantages or disadvantages. If a by-election was called in 1979 which had the nature of a primary, the same procedure should be followed in the future unless the statute is amended. The people deserve that interpretations of such a fundamental statute as the one under our consideration, be consistent, fixed, and permanent. The state of law cannot be changed every year depending on the political situation of the moment. The most logical and rational interpretation was that issued in 1979 by the Governor, the Secretary of the N.P.P., the Commonwealth Elections Commission, and its legal advisor.

We must still decide if the statute, as we have interpreted it, is or is not valid. The interveners and the Governor contend that if the remedy requested by the P.D.P. is granted, the right to suffrage guaranteed by Sec. 2, Art. II, of our Constitution and art. 2.001(11) of the Electoral Law, 16 L.P.R.A. §3051(11), would be vulnerated. We are the first to recognize that the right to suffrage is fundamental. *Ortiz Anglerò* v. *Barreto Pèrez*, 80 J.T.S. 67; *P.S.P.* v. *Comisiòn*, 80 J.T.S. 92; *P.S.P., P.P.D. and P.I.P.* v. *Romero*, 80 J.T.S. 81; *P.N.P.* v. *Tribunal Electoral*, 104 D.P.R. 741 (1976). However, said right is not absolute. Our constitutional system has recognized the importance of

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Party	Candidate	Straight	Split	Total
PDP	Ramón Muñiz	16,957	2,234	19,191
NPP	Erick Hernández	17,263	1,282	18,545
PIP	Aldelino Márquez Borges	1,414	1,039	2,453
PSP	Carmen A. Fonseca Acevedo	105	30	135

political parties and, in some situations, its rights have prevailed over the general and abstract right of the electorate. *García Passalacqua* v. *Tribunal Electoral,* 105 D.P.R. 49 (1976); and *Fuster* v. *Busó,* 102 D.P.R. 327 (1974),[10] decided that the seats of legislators-at-large and additional legislators belong to the party under whose column they appear in the ballot. The same rationale should be used for district legislators. In this sense, we are convinced by the statements of senators Negrón López, García Méndez, and Ortiz Stella cited above. The fact that a vacancy has occurred cannot prompt any changes in the partisan composition of a legislative body.

Although we are dealing with a matter of local law, we are persuaded by cases like *Parker* v. *Nobles,* 496 S.W.2d 921 (Texas, 1973); *Valenti* v. *Rockefeller,* 292 F. Supp. 851, affirmed in 393 U.S. 404; *Phillips* v. *Rockefeller,* 321 F. Supp. 516, which recognize the ample margin the States have for choosing the procedure for filling vacancies, and that the Federal Constitution does not provide a stringent and unflexible method. As an example of states which acknowledge that the seat belongs to a party, see Art. II, Sec. 15, of the Constitution of Washington; Art. II, Sec. 13, Constitution of North Carolina; Art. V, Sec. 2, of Colorado; Art. III, Sec. 13, Maryland; Art. IV, Sec. 12, Nevada; Art. III, Sec. 2(d), Illinois. Other constitutions are similar to ours in providing that the vacancy shall be filled as provided by law, Hawaii, Art. III, Sec. 5; Kansas, Art. II, Sec. 9. Others have resorted to the by-election method, Louisiana, Art. III, Sec. 4; Iowa, Art. III, Sec. 12; Arkansas, Art. V, Sec. 6. California has a mixed method for filling vacancies, Elections Code, sec. 7201. First of all an election is held wherein the provisions on primaries are applied. In *Kellam* v. *United States,* 147 Cal. Rptr. 884 (1978), it was decided that to make more requirements to independent candidates than to parties for appearing in the initial ballot does not violate the Constitution. Said case also recognizes the parties' importance and supremacy over minority groups. *Cf. Dávila* v.

[10] For a recent analysis which recognizes the important rights of a party, see *Democratic Party* v. *La Follete,* 49 L.W. 4179 (February 25, 1981) which ruled that a party may limit the participation in its internal primaries to its affiliates.

Sec. of State, 83 P.R.R. 180 (1960). If none of the candidates obtains a majority of all the votes cast, another election is held where only the candidates of the main political parties may participate. This method was overruled in *Libertarian Party of Cal.* v. *United States*, 147 Cal. Rptr. 888 (1978), because there had been a total and systematical exclusion of independent candidates or parties which were not recognized and which could not participate in the general election to fill the vacancy. Aside from the fact that we are not bound by a state court decision, the same is not persuasive. In that case, a general election was held wherein all parties could participate. In the case at bar, art. 5.006, as we have construed it, establishes a primary procedure which, as we have seen, may be limited to candidates and electors affiliated to the party to which the vacant seat belonged. *Democratic Party* v. *La Follete*, 49 L.W. 4179.

Different procedures in the state of New York are used, depending on the office and the date when the vacancy occurs. It can be filled through an election or through an appointment. McKinney's Consolidated Laws of N.Y., Public Officers Law, sec. 42-43.

In our opinion, *Reynolds* v. *Sims*, 377 U.S. 533; *Harper* v. *Virginia Board of Elections*, 383 U.S. 663; *Kramer* v. *Union Free School District*, 395 U.S. 621; *Dunn* v. *Blumstein*, 405 U.S. 330, and *Ortiz Anglerò* v. *Barreto Pèrez*, 80 J.T.S. 67, should be distinguished. Said cases overrule statutes which bar the right to vote in an election, based on impermissible reasons, there being no compelling state interest to justify said exclusion or limitation. Section 5.006 sets forth an internal primaries process. We have already seen that the rights of the electors vis-à-vis those of the main political parties, are not absolute. *Garcia Passalacqua* v. *Tribunal Electoral, supra; Fuster* v. *Busò, supra*, and *Dàvila* v. *Sec. of State, supra.* We deem that the traditional test is the one which should be applied for examining the reasonability of the classification here in controversy (that which limits participation to P.D.P. affiliates). The classification under scrutiny is not suspect from its face. It does not rest on impermissible constitutional criteria. *P.S.P.* v.

Romero Barceló, 80 J.T.S. 80 (Per Curiam opinion of October 27, 1980). We see here a rational nexus between the classification and the compelling state interest, to wit, that vacant seats belong in the first instance to the party which nominated the legislator. This classification is not contrary to the Constitution of the United States, *Parker* v. *Nobles,* 496 S.W.2d 921, 924. From a local point of view, Sec. 8 of our Constitution provides that the implementation of the pertinent method is within the discretion of the Legislature and the Governor. We have seen that they chose to recognize the primary interest of the party to which the vacant seat belonged. A by-election where other parties' affiliates may participate shall be held only if said party cannot or does not wish to present a slate, 16 L.P.R.A. §3155.

THE REMEDY

Representative Muñiz died on January 28, 1981. Pursuant to sec. 5.006(b) the P.D.P. has until March 29, 1981 (60 days) to present a slate. Now then, since the Governor's erroneous interpretation has limited and affected the P.D.P.'s statutory right, we deem just and reasonable, in order to prevent this controversy from becoming academic, *Comisión para Asuntos de la Mujer* v. *Giménez Muñoz,* 80 J.T.S. 40, we hereby order that, if the P.D.P. cannot comply in due time with the laws and regulations regarding the holding of primaries, and cannot present its slate on or before March 29, 1981, the Administrator and the Commission shall reasonably extend the term to do so. The P.D.P. shall make the corresponding proposal before the Commission and the Administrator. If necessary, the Governor and the Commission may enlarge the term for holding the by-election.

JUDGMENT

In view of the foregoing, we enter judgment finding for plaintiff. Defendants, the Hon. Governor of Puerto Rico and the Hon. General Administrator of Elections shall take the pertinent steps so that in the by-election to be held to fill the

vacancy that arose in Representative District No. 31, only candidates and electors affiliated to the Popular Democratic Party participate. We include as an important part of this judgment the provisions of the preceding paragraphs under the heading "The Remedy."

In view of the remedy's nature, this judgment shall take immediate effect. Failure to comply would entail contempt of court.

To be entered and notified.

In San Juan, Puerto Rico, this 20th day of March 1981.

PETER ORTIZ
Judge

(Translation)

APPENDIX B

IN THE

Supreme Court of Puerto Rico

No. 0-81-150
No. R-81-118

Declaratory Judgment and Injunction

POPULAR DEMOCRATIC PARTY,
Plaintiff and appellee

v.

CARLOS ROMERO BARCELÓ *et al.*,
Interveners and appellants

POPULAR DEMOCRATIC PARTY,
Plaintiff and appellee

v.

CARLOS ROMERO BARCELÓ, GOVERNOR OF P.R.,
Defendant and appellant

GERINELDO BARRETO PÉREZ, *etc.*,
Defendant and appellee

San Juan, Puerto Rico, May 8, 1981

PER CURIAM: This case raises, in essence, a question of statutory construction: what is the procedure for filling a vacancy in the office of a Senator or Representative for a district

according to the provisions of arts. 5.006 and 5.007 of the Electoral Law in force?[1]

The facts of the case are simple. There is no controversy around them. The Popular Democratic Party candidate for Representative District No. 31 was elected to office in the general election held on November 4, 1980. He died on January 28, 1981, after being sworn into office. Based on an opinion of the Secretary of Justice, on February 26, 1981, the Honorable Governor of Puerto Rico called a By-Election[2] to be

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[1] Article 5.006

When a vacancy occurs in the office of a senator or representative elected as an independent candidate for a district, or when a vacancy occurs in the office of senator or representative for a district, nominated by a party before the fifteen (15) months immediately preceding the date of the following general election, the Governor, with the advice of the Commission shall, within the thirty (30) days following the date on which the vacancy occurred, call a by-election in such district which shall be held no later than ninety (90) days after the date of the call, and the person elected in such by-election shall hold the office until the term of his predecessor has expired.

If within sixty (60) days following the date such vacancy arises, the party to which the legislator of the vacant office belonged has not presented a candidate to fill such office, the office shall be deemed to be that of an independent legislator, to the effects of holding the by-election to fill it.

In the event the vacancy is that of an independent candidate, any elector affiliated to a political party or duly qualified as an elector, who fulfills the requirements of such office, may be presented as a candidate in said election.

Whenever a vacancy occurs in the office of a senator or representative-at-large who had been nominated by a party, or when, within the fifteen months preceding a general election a vacancy occurs in the office of senator or representative of a district, it shall be filled by the President of the proper Body by nomination of the political party such senator or representative belonged to, with a person selected in the same manner as his predecessor.

Article 5.007

All electors entitled to vote within the geographic district in which the by-election is to be held, pursuant to the call issued by the Governor to such effect, shall vote in a by-election.

[2] WHEREAS: Article 5.006 of the Electoral Law of Puerto Rico, Act No. 4 of December 20, 1977, provides the procedure to follow when there is a vacancy in the office of Senator or Representative for a District nominated by a Party before the fifteen (15) months immediately preceding the date of the following General Election.

(footnote continues)

held on May 24, 1981. The candidate elected in said by-election would take the vacant seat. On March 3, 1981, the Popular Democratic Party filed before the Superior Court an action for declaratory judgment and injunction challenging the terms of the above-mentioned call. The P.D.P. contends that, in said by-election, only candidates and voters affiliated to the P.D.P. could participate. Ten electors of Representative District No. 31, who were not affiliated to the P.D.P., requested intervention raising objection to plaintiff's contention. The intervention was permitted. The case was submitted on documentary evidence.

On March 6, 1981, the Superior Court entered judgment finding for the plaintiff. In brief, it ordered the Hon. Governor and the General Administrator of Elections to take the necessary measures so that only candidates and electors affiliated to the P.D.P. participate in the by-election. On March 24, 1981, the intervener electors filed a notice of appeal while the Governor filed a petition for review of said judgment. Both

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(footnote continued)

WHEREAS: On February 12, 1981, the Acting Secretary of Justice issued an Opinion where he states that, pursuant to arts. 5.006 and 5.007 of the Electoral Law of Puerto Rico, the Governor shall call all the electors without restricting the participation of those electors who are duly qualified as such.

WHEREAS: The Hon. Carlos Romero Barceló, Governor of Puerto Rico, in harmony with the provisions of the Electoral Law, sought the pertinent advice from the Commonwealth Elections Commission with regard to the date to hold the By-Election, as well as any other technical information of an electoral nature related thereto.

WHEREAS: The By-Election to fill said vacant office shall be held no later than ninety (90) days after the date of the call, and the person elected in such By-Election shall hold office until the term of his predecessor has expired.

WHEREAS: In a Special Session held on Friday, February 20, the Commission agreed to set the By-Election of Representative District No. 31, for May 24, 1981.

WHEREFORE: I, Carlos Romero Barceló, Governor of the Commonwealth of P.R., in the use of the authority vested in me by the Constitution and by the Electoral Law of P.R., do hereby call a By-Election in Representative District No. 31, in order to elect the Representative for said District, constituted by Caguas Precinct No. 86, among all the electors within the geographic district comprised within Caguas Precinct No. 86, to be held on Sunday, May 24, 1981.

appeals maintain that the judgment of the Superior Court is erroneous because it incorrectly construes the pertinent provisions of the Electoral Law and violates the constitutional rights of the electors of Representative District No. 31. Both appeals pray that we reverse the judgment and determine that all the electors within the geographic demarcation of Representative District No. 31 are entitled to vote in the by-election and that independent candidates may also participate. By virtue of the immediate effect of the judgment rendered by the Superior Court—see *Peña* v. *Federación de Esgrima de P.R.*, 108 D.P.R. 147 (1978)—the appellants filed before this Court motions in aid of jurisdiction. On March 26, 1981, we issued the writ of review. We consolidated the appeals and granted the parties until April 10, 1981, to file their respective briefs. On March 27, 1981, in aid of our jurisdiction, we suspended the judgment below and paralyzed the terms provided by art. 5.006 of the Electoral Law. Since we are dealing here with an appeal for declaratory judgment, our duty is to determine the scope and construction of the statute.

How is a vacancy in an office of District Representative filled, according to the provisions of arts. 5.006 and 5.007 of the Electoral Law? The statute is obscure, a good example of unfortunate drafting. However, it is our duty to fill whatever gaps might exist and to harmonize those provisions which are or which seem to be in conflict. Article 7 of the Civil Code, 31 L.P.R.A. § 7.

According to the statutory provisions before our consideration, whenever a vacancy occurs in the office of Representative for a district nominated by a party before the fifteen months preceding the date of the following general election, the Governor, with the advice of the Commonwealth Elections Commission, shall call a by-election in the district affected by the vacancy.

It is clear that the main purpose of the above-mentioned art. 5.006 is to provide the party vacating a set in the Senate or the House due to the incumbent's death, resignation, or any other reason, with a means to reestablish the legislative balance of power, substituting him with any other of its members bona

fide. The ruling premise of said article is the substitution of the original incumbent with any other member of the political party that elected him. This can be inferred from the text of the second paragraph of the said article, which grants a clear preferential option to "the *party* to which the legislator of the vacant office belonged" to present a candidate "to fill such office," and only by way of exception shall other *independent* candidates be admitted if said party does not present a candidate within 60 days. The purpose is to maintain the balance of power between the parties, by means of which the House was constituted, not to alter or modify it. The statute clearly established the right of the political party to keep the seat it won in the general election inasmuch as the party would only lose the seat through its own indolence or overt lack of interest by failing to present a candidate of its own to substitute the legislator who caused the vacancy. The autonomy of the party to fill the vacant seat is preserved. When a party selects one candidate, observing due process and the equal protection of the rights of the electors seeking nomination, the priority alternative of art. 5.006 is complied with, making its obviously unnecessary to resort to the *second alternative,* the by-election. If, on the contrary, the party to which the legislator who caused the vacancy belonged presents more than one candidate before the Commonwealth Elections Commission within the statutory sixty-day term, or if such term has expired and no candidate has been presented, then a by-election should be called where "[a]ll electors entitled to vote within the geographic district in which the by-election is to be held . . . " shall vote. This provision limits participation in the by-election to the electors of the district where the vacancy occurs. In this last case, other candidates are admitted only when the party to which the legislator who caused the vacancy belonged does not present any candidate whatsoever. This is consistent with the statute's clear intention of making a distinction in the manner of filling the vacancy of a representative for a district, based on whether or not the vacancy occurs within the fifteen months preceding the following general election. If the vacancy occurs within said period, it shall not be filled in a by-election, but in the same way his predecessor was selected. If the vacancy occurs before

the above-mentioned fifteen-month period, it will be filled in one of three ways, to wit: 1) a by-election wherein candidates of any party and independent candidates may run for office—this is in case the party does not present a candidate within the sixty-day period; 2) a by-election where only affiliates of the party to which the legislator who caused the vacancy belonged may run for office—this occurs when the party presents more than one candidate within said period; and 3) no by-election—this happens when the party presents only one candidate within the sixty-day term. In this case said candidate is automatically elected to fill the vacancy.

The Act provides the by-election as a supplementary method in the event that the party affected by the vacancy does not present a candidate within the 60 days following the date such vacancy arises. The Governor's call to a by-election and the isolated provision of art. 5.007 defining the persons entitled to vote as "all electors . . . within the geographic district," are nothing more than reserve procedures activated only when the party does not make its preferential proposal to fill the vacancy. The statute preserves the party's autonomy to select, through its own by-laws, the candidate who shall be presented to fill the vacant seat. When a before or within candidate, observing due process and the equal protection of the rights of the electors seeking nomination, the prioritary alternative of art. 5.006 is complied with, making it obviously unnecessary to resort to the second alternative, the by-election.

Whether the vacancy occurs *before* or *within* the fifteen (15) months preceding the date of the following general election, the procedure established by the Act is that of *substituting* the legislator of the party who won the seat at the general election, frustrating any intent to change the composition of the legislative body determined in said general election.

The legislative history substantially supports this construction. A dialogue between Senator Cancel Ríos and Senator Oreste Ramos regarding the controversy at bar—and which is

copied at the foot of this page—[3] shows that the vacancy belongs to the party to which the legislator who caused it belongs. The construction is also in harmony with that made by

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[3] We copy the dialogue below:

MR. CANCEL RIOS: Evidently there is a conflict here, colleague, because the text before us treats the independent legislator as a Representative at-large, and even more, according to the text, we are going to change the very nature of the legislative seat by turning it into an independent seat and that is not mentioned in the Constitution. At page 110 of the Bill, it is stated: "If within sixty days following the date such vacancy arises, the party to which the legislator of the vacant office belonged has not presented a candidate, and these are district representatives, to fill such office, the office shall be deemed to be that on an independent legislator, to the effects of holding the by-election to fill it. That is not mentioned in the Constitution."

MR. ORESTE RAMOS: The colleague is referring to the fact that if the proposed provision were to include an independently elected Senator or Representative—which case is not contemplated by the Constitution—this would violate the Constitution.

MR. CANCEL RIOS: We believe so. We also think that there is a confusion of terms when we speak of 30 and 60 days.

MR. ORESTE RAMOS: But, colleague . . . we do not understand your position. I mean, the colleague is saying that the Constitution is silent about independently elected Senators or Representatives. In other words, there is a gap in the Constitution with regard to independently elected persons. The legislation would fill that gap regarding independently elected Senators and Representatives. I understand the position of our colleague if he is saying that by filling such gap the Constitution would be violated.

MR. CANCEL RIOS: No, no, it is not a matter of filling a gap, distinguished colleague, but of changing the nature of the office. According to that statutory provision, if the party cannot fill the office of Representative or Senator of a District within 30 days, he becomes an independent candidate, and that is not stated in the Constitution.

MR. ORESTE RAMOS: Excuse me, colleague, it is not that he becomes an independent candidate, but that he will be treated as if he were an independent candidate. We agree on that.

MR. CANCEL RIOS: Of course, he becomes so.

(footnote continues)

the Governor himself and by the Commonwealth Elections Commission when a vacancy occurred in Representative District No. 40 in 1979. In fact, the first vacancy in the office of a

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(footnote continued)

MR. ORESTE RAMOS: Would he be receiving the same treatment?

MR. CANCEL ROIS: An independent treatment?

MR. ORESTE RAMOS: Yes.

MR. CANCEL RIOS: Just like Senators and Representatives-at-Large for whom all the country votes.

MR. ORESTE RAMOS: No, no, excuse me. Would the vacancy of said Senator or Representative be filled if it is not filled in the legislative term for independent candidates?

MR. CANCEL RIOS: No, no, colleague, the legislation . . . That is not stated in the Constitution.

MR. ORESTE RAMOS: I know, colleague, but I want to pinpoint this. The net product of the colleague's argument regarding the text of the bill is that if the vacancy is not filled within a 30-day term that Senator or Representative shall be deemed to be an independent candidate. In the end, what that means is that the vacancy would be filled as the bill provides for filling the seat won by an independent candidate.

MR. CANCEL RIOS: No, colleague, that is not the case. A party which elects a House or Senate candidate for a district, is a Senator or Representative for a District who belongs to said party, and what this bill seeks to attain or accomplish is that said candidate, I mean, said representative, not candidate, or senator elected in a general election and who belongs to a certain party, pursuant to this Act, if the vacancy is not filled in thirty days the seat acquires an independent nature and the Constitution treats it differently.

MR. RAMOS ORESTE: And how does the Constitution treat independent candidates?

MR. CANCEL RIOS: I read that to you, colleague.

MR. RAMOS, ORESTE: No, wait, I thought that what the colleague said was . . .

MR. CANCEL RIOS: It gives . . .

MR. RAMOS, ORESTE: Does not give any.

MR. CANCEL RIOS: No, it does not.

MR. RAMOS, ORESTE: To independent candidates?

(footnote continues)

District Representative under the Act now in force arose on June 21, 1979, when *N.P.P.* representative Alejandro Cruz Ortiz, resigned to his seat corresponding to Representative

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(footnote continued)

MR. CANCEL RIOS: To independent candidates. In fact, that is why the act in force separates the provisions which deal with independent candidates from those dealing with candidates at large.

MR. RAMOS, ORESTE: Yes colleague, I would like you to tell me why, if the seat is not filled within the term specified, to consider it as a set for which an independent candidate was elected would result in a substitution procedure different from the one that would be used if the candidate had not been independent?

MR. CANCEL RIOS: What I am telling you, distinguished colleague, is that the provision of the Act changes the nature of the seat, and that cannot be.

MR. RAMOS, ORESTE: But does the seat remain vacant in both cases?

MR. CANCEL RIOS: It does . . . but there are thirty days to turn . . . a seal belonging to a party, it only gives thirty days if within its internal procedures the party, as is our case, before the law provides that this office be filled by holding primaries and is only given thirty days to carry them out, or if the Electoral Tribunal, or whatever you want to make up, cannot carry out those primaries, this Act provides that the office won by a party at a general election shall become an independent office for which anybody could be nominated, and all political parties could take party in the process.

MR. RAMOS, ORESTE: After thirty days?
MR. CANCEL RIOS: After thirty days.

MR. RAMOS, ORESTE: And anyone could run for office?

MR. CANCEL RIOS: According to these provisions, yes.
(FOOTNOTES APPENDIX B)

MR. RAMOS, ORESTE: In other words, an election would be held after the thirty-day term.
MR. CANCEL RIOS: According to this provision, yes.

MR. RAMOS, ORESTE: I ask you, colleague, because I was particularly interested in seeing that part of the proposed legislation to which you referred to tells us that, in that case, an election would be held and anybody could run for office.

MR. CANCEL RIOS: That is so.

MR. RAMOS, ORESTE: Then it does not remain vacant?

(footnote continues)

District No. 40. On July 20, 1979, the Hon. Governor issued a proclamation convoking a "primary election" between candidates and voters affiliated to the *N.P.P.* The Governor

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(footnote continued)

MR. CANCEL RIOS: Well, no, but what happens is that other persons, who are not entitled to it, could hold an office belonging to a party that won it in an election.

MR. RAMOS, ORESTE: That party left it vacant?

MR. CANCEL RIOS: It left the office vacant because it has not been able to fill it. Let us imagine that the party cannot hold primaries in a period of thirty days. Let us suppose that the absurdity you want to create cannot hold primaries in thirty days, because, according to this Act, for example, the case of Arecibo, well the Senator elected for that District, or the Representative, one of the Representatives of that District elected by the majority in the previous elections, well, that seat does not belong to that party, that seat shall be part of a dispute between independent candidates and candidates of all the parties.

MR. RAMOS, ORESTE: And how is it filled? How do you think it is going to be filled, according to the proposed legislation, after the thirty-day term?

MR. CANCEL RIOS: According to this, these offices belong to the party.

MR. RAMOS, ORESTE: No, no, excuse me, colleague. According to the proposed legislation. How do you think this seat would be filled after the thirty-day term?

MR. CANCEL RIOS: If it belongs to . . . according to the Constitution . . .

MR. RAMOS, ORESTE: No, no, excuse me, colleague, according to the legislation.

MR. CANCEL RIOS: No, according to the Constitution. That is what matters. That is what I am talking about, colleague, it is according to the Constitution. If the office of a legislator, if a person holds an office as independent legislator, well, that is no problem, because he was elected as an independent candidate, and if a vacancy arises, well, everybody is entitled to run for that, and that is why the Constitution, and the law which governs us now, which is a special law, gives a different treatment to legislators-at-large and to legislators who hold an office in behalf of and in representation of a party, and the actual effect of that provision is that if that party fails to hold internal primaries within thirty days based on the rights of the voters within a party, well, simply, the party which won the seat at the election shall

(footnote continues)

understood that if candidates of said party participated, strictly speaking the by-election would be a primary. This was also understood by the Commonwealth Elections Commission when, seeing that only one candidate was presented, the Commonwealth Secretary of Elections certified that "since there is only one candidate for the above-mentioned vacant seat, we respectfully recommend that the General Administrator of Elections certify Mr. Salomón Rondón Tollen as Representative for Representative District No. 40." The Commission adopted the official opinion of the administrator's legal advisor in a memorandum of October 5, 1979, where it was stated that "Law cannot seek absurdities, and reason tells us that only the members of the party to which the legislator whose vacant seat prompted the holding of a by-election belonged, are entitled to

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(footnote continued)

> run the risk of losing it to other [sic] party or to other [sic] independent candidate.
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> *MR. RAMOS, ORESTE:* Colleague, my question is, how do you think that the seat would be filled if it was not filled within the thirty-day term, if that is the case?
>
> *MR. CANCEL RIOS:* According to the provisions of the Act in force.
>
> *MR. RAMOS, ORESTE:* No, colleague, according to the proposed legislation.
>
> *MR. CANCEL RIOS:* No, according to the proposed legislation. Look, colleague, what I have been telling you from the beginning is that in this draft there is a confusion of the terms corresponding to legislators-at-large, the term corresponding to the independent legislator, and the term which corresponds to a legislator elected by a district.
>
> *MR. RAMOS, ORESTE:* But, colleague, the question is how do you think the office would be filled, according to the proposed article, as proposed, that is, after thirty days have elapsed and the office has not been filled as provided for those thirty days?
>
> *MR. CANCEL RIOS:* If it is a district representative, it would be filled with an independent one.
>
> *MR. RAMOS, ORESTE:* That is what it says there?
>
> *MR. CANCEL RIOS:* Oh, yes, that's what it says.

vote in said by-election, particularly if the party to which the candidate belonged presented candidates within the statutory term."[4]

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[4] Insofar as pertinent, Mr. Pagán's memorandum reads as follows:

1. The political history of the Puerto Rican parties of not meddling in the internal affairs of the other political parties.

2. The Act does not expressly provide what should be included in the Governor's call, and it does not expressly restrict or prohibit the calling of only those candidates belonging to the party, on the contrary, it leaves the door open to limiting the call to the candidates of the party in question. Any conduct not expressly barred by law is permitted. This is a general rule of law.

3. The legislative intent as it appears from a thorough reading of art. 5.006 is that only the candidates affiliated to the party to which the former incumbent belonged and whose office is now vacant, are entitled to vote. The very article leaves the door open to the possibility that an independent candidate be presented within the statutory period.

4. Law cannot seek absurdities, and reason tells us that only the members of the party to which the legislator whose vacant seat prompted the holding of a by-election belonged, are entitled to vote in said by-election, particularly if the party to which the candidate belonged presented candidates within the statutory term.

5. The Governor's convocation was for a primary, and it was thus informed to the people.

6. The people, the voters have traditionally given the name of primaries to these by-elections and they have traditionally understood that only those affiliated to the party to which the legislator whose vacancy prompts the holding of said by-election belonged, are entitled to vote. In our democratic system the government is governed by the will of the people. The will of the people would be frustrated if the article in question is construed in any other way.

7. Apparently, there is a lapsus in the text of art. 5.007 and it seems to contradict the legislative intent behind art. 5.006 of the Electoral Law in force. It would also be contrary to art. 1.002 which provides:

> "For that reason, our constitutional mandate also extends express recognition and categorical rights to the political parties. . ."

(footnote continues)

Appellant asks us to construe the statute in the sense that the result of having said party present a slate within the statutory term, is that only said party has the right to present a slate without prejudice that independent candidates participate in the by-election. If the party does not present a slate within the statutory term, then, according to appellants, all parties may present slates. According to this construction the presentation of candidacies within the statutory term would be consequential only if other parties may present slates, but it would not affect the independent candidates' right to participate in the election. Such construction is untenable. As we can see from the dialogue between Senators Ramos and Cancel Ríos, neither the letter nor the purpose behind it support such construction.

We have still to pass upon the constitutional validity of the procedure for filling the vacancy in controversy in the light of the construction of the statutes under our consideration.

The equal protection of the law and the right to vote are invoked herein. Insofar as the right to vote is concerned, appellants' contention is deceptive. We explain ourselves. They claim their right to vote in an election to fill a vacancy based on the construction of the statute; on the other hand, said construction of the statute is based on their right to vote. To interrupt this circular trend of thought we would, first of all, have to establish the constitutional requirement to hold an election to fill the vacancy, and the right to vote in said election. But the Constitution does not provide a method for filling the

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(footnote continued)

8. The Fact that if a vacancy occurs within the 15 months preceding a general election, a by-election would not be necessary. If this matter would have been so critical, the lawmaker would have provided for the holding of these by-elections in every case.

In view of the foregoing, I recommend that Rule 1 of the Draft Regulations for By-Elections be amended in order to add this phrase at the end of the last sentence of the Rule:

> "And that only those affiliated to the Party to which the legislator whose vacancy prompts the holding of a by-election belonged, be entitled to vote."

vacancy.[5] The amendment to Sec. 8, Art. III, of the Constitution of the Commonwealth of Puerto Rico, made in November 1964, left the method for filling the vacancies in the hands of the Legislature. Hence, the constitutional right to vote cannot be invoked to force a particular construction of a statute which governs the manner of filling a legislative vacancy when the Constitution left the matter in the hands of the Legislative Assembly. For this same reason, appellants cannot invoke either the rule that when a statute is susceptible to two constructions, one of which is unconstitutional, the courts shall adopt the construction which overcomes the constitutional problem. We are dealing here with an obscure statute susceptible to several constructions, but all constitutionally valid. That is why our function is limited to finding the true legislative intent.

Finally, the method designed by the lawmaker has no defects with regard to the equal protection of the law. The exclusion of candidates of other parties and of independent candidates does not violate the constitutional guarantee to the equal protection of the law. Even assuming that the strict scrutiny rule is applicable, there is a compelling public interest directing the lawmaker to consider that the vacant seat belongs to the party who nominated the legislator. Among those compelling interests the following can be singled out: that there be no changes in the legislative balance until the next general election is held, the stability of governmental structures, the protection of the electoral mandate of the previous general election, and the reduction of inter-partisan political campaigns to once every four years.

We conclude, then, that, according to our construction, arts. 5.006 and 5.007 of the Electoral Law—which deal with the method of filling a vacancy of a district legislator—have no

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[5] The Constitution of the United States does not require either a fixed method for filling vacancies. As it is noted and explained at p. 27 of the opinion of the Superior Court, some State Constitutions recognize that the seat belongs to the party; others adopt the election system, while others leave the matter to the Legislature's discretion.

constitutional defects whatsoever either under the Constitution of the Commonwealth of Puerto Rico, or under the Constitution of the United States of America.

The call issued by the Governor on February 26, 1981, altered the terms provided by art. 5.006 of the Electoral Law. Even before considering what would be the correct construction of the statute, we paralyzed those terms in aid of our jurisdiction. Since more than a hundred days have elapsed since the vacancy in District No. 31 occurred, we must provide some reasonable terms similar to those established by the statute, but reduced in half in view of the time elapsed. Our key date shall be that of the service of notice of this Judgment. The Popular Democratic Party shall have 30 days, from the date of service of notice, to present before the Commonwealth Elections Commission a slate to fill the vacancy. If said slate is limited to one candidate, the Administrator shall declare that said candidate is entitled to hold the vacant seat. If the slate includes more than one candidate, the Governor shall, within a fifteen-day term after the slate is presented, call a by-election where only the persons named in the Popular Democratic Party's slate may run for office, without the participation of candidates of other parties or of independent candidates. If the Popular Democratic Party fails to present a slate within the thirty-day term, the Governor shall, within the next 15 days after the other term has expired, call a by-election where persons affiliated to any party or independent candidates who meet the requirements of the office may run. In the event that there is a by-election, all qualified electors of District No. 31 shall be entitled to vote. The by-election shall be held within a 45-day term after the call is issued by the Governor.

Judgment shall be rendered accordingly.

Separate opinion of MR. JUSTICE DAVILA.

San Juan, Puerto Rico, May 8, 1981

I agree with this Court's construction of art. 5.006 of the Electoral Law, save for one thing. If there is more than one

bona fide candidate for the vacant seat, the party in question cannot prevent that the statutory by-election be held, by holding an internal primary where only voters affiliated to said party may participate. If this were allowed the provision of the act to the effect that a by-election must be held in order to choose the substitute, would be frustrated. Since we are aware that, in this case, there is more than one candidate for the vacant seat, a by-election should be held where all the qualified electors of that district be entitled to vote.

Separate opinion of MR. JUSTICE IRIZARRY YUNQUE.

San Juan, Puerto Rico, May 8, 1981

I cannot agree with that part of this Court's opinion which allows a by-election to fill a vacancy of an office won by a political party, where voters not affiliated to said party may participate. In my opinion, this construction cannot be derived from art. 5.006 and 5.007 of the Electoral Law, 16 L.P.R.A. §§ 3206 and 3207, respectively, nor is there any basis whatsoever to think that such was the legislator's intent when he drafted said articles. In fact, this was not the construction adopted by the Commonwealth Elections Commission— administrative body whose construction of the Electoral Law deserves our deference because it is the agency which must implement said Act—when it provided for the filling of the vacancy in Representative District No. 40 in 1979. The opinion of the Commission's legal advisor, which was adopted by said agency, stated the following: "Law cannot seek absurdities, and reason tells us that only the members of the party to which the legislator whose vacant seat prompted the holding of a by-election belonged, are entitled to vote in said by-election, particularly if the party to which the candidate belonged presented candidates within the statutory term."

I agree with the fact that the drafting of the above-mentioned articles is rather confusing. It is our duty to construe them and to harmonize their provisions—art. 7 of the Civil Code, 31 L.P.R.A. §7—in order to draw logical solutions. When doing so, we must bear in mind that we have always

respected the principle that legislative seats belong to the political parties, save when the legislators are elected as independent candidates. As it was stated by the Commonwealth Elections Commission's legal advisor in his memorandum of October 5, 1979, which was adopted as the Commission's opinion, "[the] political history of the Puerto Rican parties of not meddling in the internal affairs of the other political parties," is a decisive factor in this construction. Said memorandum is transcribed *in extenso* in footnote No. 4 of the opinion of the Court.

To my mind, the only logical and legal construction of the above-cited arts. 5.006 and 5.007[1] is to fill a legislative seat won by a political party—whose vacancy has been caused by the death of a representative elected by a representative district—within the fifteen months preceding the date of the following general election. According to art. 5.006, the party must "present a candidate"* to fill the vacancy "within sixty (60) days following the date such vacancy arises." If the party so decides, based on its own internal mechanisms, the slate may include one candidate; the party could also hold a primary if there is more than one candidate for filling the vacancy and if it wishes that the election be held under the supervision of the Commonwealth Elections Commission, which is the government's electoral agency. In the first case, the candidate chosen shall be certified to fill the vacancy without the need of a by-election. In the second case, that is, if primaries are to be held, the party shall so notify the Commonwealth Elections Commission so that the Governor may issue the corresponding call to a by-election. This is consonant with art. 5.006 which provides that the Governor, "with the advice of the Commission," shall call a by-election.

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[1] Said articles are copied in footnote No. 1 of the opinion of the Court, and are not reproduced here in order to avoid repetition and to save up space.

* [Translator's note: In the official English translation of the Electoral Law, the word "candidatura" in sec. 5.006 is translated as "a candidate," and not as "candidacy" or "slate."]

Article 5.007, 16 L.P.R.A. § 3207, provides:

> All electors entitled to vote within the geographic district in which the by-election is to be held, pursuant to the call issued by the Governor to such effect, shall vote in a by-election. (Underscore supplied.)

The article cannot be construed to mean that all the electors of the district where the vacancy occurred are entitled to vote in the by-election called to elect one candidate from among those belonging to the party which won the seat. Only "electors entitled to vote," that is, entitled to vote in said election, shall be called.

In that case, the "electors entitled to vote" are logically those who are bona fide members of the political party which won the seat. Hence, the by-election is nothing more than a primary to be held pursuant to and in keeping with the provisions of the Electoral Law. See arts. 4.001 to 4.029, 16 L.P.R.A. §§ 3151 to 3179. Note that when art. 4.001, 16 L.P.R.A. § 3151, enumerates the "essential principles for every candidacy" it specifies that "(c) No political party shall nominate more than one candidate for each office nor more than one slate." In my opinion, this provision is revealing. Obviously, a party does not nominate more than one candidate for an office. Many party members may be candidates to nomination, but the party shall nominate only one of them.

It is absurd to think that a party would be willing to let the electors of other parties decide who must be elected to fill the vacancy. This possibility is unreal. The fact that a statute is confusing cannot justify that it be read as if consecrating absurdities.

Finally, I must point out that I have not ignored the concurrence of two terms in art. 5.006, which might seem contradictory. We must remember that our duty is to harmonize contradictions, whether real or apparent. The above-cited article states that "the Governor, with the advice of the Commission shall, within the thirty (30) days following the date on which the vacancy occurred, call a by-election in such

district." Later on, it says that "[i]f within sixty (60) days following the date such vacancy arises, the party to which the legislator of the vacant office belonged has not presented a candidate to fill such office, the office shall be deemed to be that of an independent legislator, to the effects of holding the by-election to fill it."

As we have seen, the call would be unnecessary if the party decides to present only one candidate. It was so stated in the opinion of the Court. But the party has sixty days to decide between presenting a candidate or going through the by-election, whereas the Governor has only thirty days to call the election—and both terms are counted from the occurrence of the vacancy. Does this mean that the sixty-day term is reduced to thirty? We think it is not. In my opinion, harmonizing both provisions, what happens is that, although the Governor has thirty days to issue the call, it may be inoperative or may be modified according to the decision the party takes within the sixty-day term. It would be inoperative if the party presents only one candidate to fill the vacancy, and it would be modified so as to limit the call to party members if the party decides to hold a primary or a by-election.[2]

With the foregoing reservations, I concur with the rest of the Court's opinion entered today.

MR. JUSTICE MARTIN, dissenting.

San Juan, Puerto Rico, May 8, 1981

I am greatly perturbed that this Court has forced an interpretation of the text of the Electoral Law—art. 5.006—as to what constitutes a "by-election", in order to conclude that said election can be bypassed if the political party to which the

[2] The terms "primary" and "by-election" are not synonymous. Neither are they antagonistic. In fact, they can be equivalent if the party selects its candidate by holding a primary. Note that, when defining the term "elections," the Electoral Law indistinctively states that it "shall mean the general election, primaries, referenda, plebiscites, or by-elections." Article 1.003(14), 16 L.P.R.A. § 3003(14). (Underscore supplied.)

District Representative that gave way to the vacancy belonged presents a "slate" limited to *one* candidate. This notwithstanding the fact that the cited art. 5.006 specifically provides that in cases where a vacancy arises *before* the 15 months preceding the date of the next general election, the Governor *will call* a *by-election* in the district where the vacancy occurred. Only in cases where the vacancies occur *within* the 15 months preceding a general election, does the law authorize the political party affected by the vacancy to select *one* person to cover said office in the same manner as his predecessor. Hence, I refrain from believing that a political party can indirectly do what the law does not directly authorize.

To arrive at the conclusion that the "by-election" can be omitted, the Court bases itself on the premise—that I deem erroneous—that art. 5.006 establishes two alternatives, the first one, given *priority* by the Court, that consists of selecting one candidate; and the second, consisting of the by-election. Aside from the fact that said art. 5.006 establishes no priority, the Court confuses the concepts "slate" and "candidate," which are clearly defined in the Act—art. 1.003(5), (7)—and considers them synonymous. The disenting opinion of brother Justice Negrón García leaves no doubt as to the difference between both terms.

The flaw in the Court's construction, of bypassing the by-election, is further demonstrated if we analyze the terms established in art. 5.006 for a by-election. The sequence of said terms reveals the purpose of making said election obligatory. First, it provides that the Governor *shall call* for an election within the thirty days following the occurence of the vacancy. Second, that the party affected has sixty days to present a slate. Third, that the election *shall* be held no later than ninety days following the call. It is simple to conclude from the letter of the law that the Governor *shall* call the elections, that the party has an additional term in order to present a slate, and that the election *shall* be held. In view of the absolute terminology used by the legislator, it was unnecessary to determine the procedure to follow if said election was not held. One cannot infer that said elections can be dispensed with. They are clearly obligatory.

What worries me more is the statement by the Court that orders by judicial *fiat*, as a *precedence*, the presentation by the Popular Democratic Party of only *one* candidate, sidestepping the by-election, since said party did not ask for said alternative in its petition for declaratory judgment wherein they accepted the call for a by-election and prayed that "it be consequently determined that in said by-election . . . only affiliated candidates and electors of the Popular Democratic Party could participate. . . ." (Underscore supplied.) It is evident that said party did not question the obligatory nature of the by-election nor the exclusive participation of *candidates* affiliated to its party. The possibility of nominating only one candidate was not even mentioned in the petition for declaratory judgment because, as I understand it, no possible interpretation of the Act provides for said eventuality.

I cannot conceive how the Court, that constitutes the last resort for protecting the rights of the citizens, could deny, by virtue of the present construction that does away with the by-election, the right that the law confers to "all electors . . . within the geographic district" corresponding to the representative district in question from participating in the by-election so provided for in arts. 5.006 and 5.007 of the Electoral Law. Said right, once granted, cannot be denied without violating the constitutional provision that guarantees the expression of the will of the people by means of equal, direct and secret universal suffrage and that protects against any coercion in the exercise of the electoral franchise, Constitution of the Commonwealth of Puerto Rico, Article II, Section 2. The expression of the Court to the effect that the party affected by a vacancy, before the fifteen months preceding the next general election, can, by presenting only one candidate, impede the holding of a by-election and hence deny the right to vote of all the electors of that geographic district, would be tantamount to interpreting that the Legislative Assembly delegated on said party the authority to deny the aforementioned electors the exercise of the electoral franchise expressly recognized by the Electoral Law. *Id.* art. 5.007.

In view of the foregoing, I emphatically dissent from the Court's forced interpretation of art. 5.006, which reads into it a legislative intent that never existed.

MR. JUSTICE NEGRON GARCIA, with whom MR. JUSTICE MARTIN joins, dissenting.

San Juan, Puerto Rico, May 8, 1981

The members of this Court are unanimously in agreement with the fact that the text of art. 5.006 of the Electoral Law (1977), regarding the method to fill a vacancy for the office of Senator or Representative for a District, is extremely ambiguous and confusing. In order to detect and precisely determine the intent and spirit enclosed in its words, one must inevitably rely on a construction of the same. The scarce legislative background, intrinsically vital for the analysis, as evidence in the debate between two senators during the session on its approval—cited *in extenso* in the majority opinion—adds nothing towards its elucidation and just raises further doubts. The speaker who raised the issue erroneously cited the old text of the Constitution (1952), overlooking the fact that it had been amended in 1964. His opponent did not help matters any, letting the error stand uncorrected. The end result of this parliamentary exchange is a nebulous dialogue which adds nothing to its analysis and clarification.[1]

[1] The debate commenced as follows:

> MR. CANCEL RIOS: For the benefit of the distinguished attorney and colleague I will quote Sec. 8 of the Constitution of the Commonwealth. "The term of office of Senators and Representatives shall begin on the second day of January immediately following the date of the general election in which they shall have been elected. If, prior to the fifteen months immediately preceding the date of the next general election, a vacancy occurs in the Office of Senator or Representative for a district, the Governor shall call a special election in said district within thirty days following the date on which the vacancy occurs. This election shall be held not later than ninety days after the call, and the person elected shall hold office for the rest of the unexpired

(footnote continues)

The opinion of this Court attempts to solve this doubt recognizing as a last resort, in the constitutional values involved, the preference of political parites over and above the right of the electors. We have tried, on our part, to overcome this obscurity resolving, as stated preliminarily on March 27, that the statute "constitutes the conciliatory and eclectic formula conceived by our Legislative Assembly to recognize the right of all the electors to participate—including those of the intervener's party—alongside the right of the affected political party to retain, in a preferential order, the vacancy and thus the initial numerical composition in the Legislature in accordance with the transcendental consitutional principles involved." To that effect we stated that this is a "by-election [sui generis] that, according to our interpretation, is nonrestrictive insofar as the electorate, [that] has the particularity of being held to fill a

(footnote continued)

term of his predecessor. When said vacancy occurs during a legislative session, or when the Legislative Assembly or the Senate has been called for a date prior to the certification of the results of the special election, the presiding officer of the appropriate house shall fill said vacancy by appointing the person recommended by the central committee of the political party of which his predecessor in office was a member. Such person shall hold the office until certification of the election of the candidate who was elected. When the vacancy occurs within fifteen months prior to a general election, or when it occurs in the office of a Senator-at-Large or a Representative-at-Large, the presiding officer of the appropriate house shall fill it, upon the recommendation of the political party of which the previous holder of the office was a member, by appointing a person selected in the same manner as that in which his predecessor was selected. A vacancy in the office of a Senator-at-Large or a Representative-at-Large elected as an independent candidate shall be filled by an election in all districts." If the distinguished colleague would care to see the 1965 law.

MR. ORESTE RAMOS: Before considering the law of 1965, if my colleague would permit me, I am much more interested for the moment in, well naturally I am also interested in that. But first, I would like my colleague to specify what conflict he finds between the constitutional mandate and the proposed text.

MR. CANCEL RIOS: Evidently there is a conflict here colleague . . . [The text cited by the Court ensues.]

vacancy belonging to a political party that has the lawful option of presenting its candidates with preferential treatment and in not doing so, then the elections are open to other parites and electors. On a conceptual level the lawmaker was able to strike a balance between the democratic interest in conflict without sacrificing the essence of one or the other." (Underscore supplied.)

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A subsequent reflection on the issue moves us to reiterate our initial view as the only viable legal alternative to a declaration of unconstitutionality. Our preliminary construction is based on the following analysis:

> This first paragraph [of the Act]: (a) establishes the necessity of a by-election if any vacancy should occur in the office of a senator or representative for a district nominated by a political party; (b) when no election is needed—fifteen months preceding the next general election; and (c) contains a series of conditions in order for the Governor to call and hold a by-election. A by-election is not synonymous with a primary, because art. 5.007 that follows provides that "[a]ll electors entitled to vote within the geographic district in which the by-election is to be held, pursuant to the call issued by the Governor to such effect, shall vote in a by-election." 16 L.P.R.A. §3207. It would be a contradiction that, on the one hand, all the electors of said district could participate, thus conceiving the same as a primary, that in essence requires the exclusive participation of electors belonging to one particular party. Article 1.003(37). 16 L.P.R.A. §3003(37).
>
> In short, one derives from the first paragraph that the Governor of Puerto Rico has a minsterial obligation to call a by-election to fill the vacancies that arise in the Legislature when said vacancy

concerns a representative district. Said call should be made within 30 days following the date when the vacancy occurred. Through an interaction of statutory definitions, the call for a by-election excludes the limited concept of primaries; all the electorate can participate.

The second paragraph—that has paved the way for so many doubts—recognizes the right of the political party that won the representative district left vacant to fill said vacancy with preference. To that effect, the law requires that party to present a "slate" to fill that vacancy within sixty days following the date when the vacancy occurred. Several observations clear up the doubt. The key word "slate," as provided for in art. 1.003(7) of the Electoral Law. 16 L.P.R.A. §3003(7), is defined as "all candidates for a political party appearing on the electoral ballot in the column corresponding to that party." We note that the lawmaker coined a very precise term the scope of which includes several candidates of the political party that won said office. He could well have referred to "a candidate" but chose not to, thereby making his intention manifest. One should keep in mind that when referring to "election" one should presume that there are several candidates; in order to elect, the voter should have more than one choice. This view is reinforced if we examine this second paragraph giving the obligation in a positive grammatical structure instead of the negative:

"If within sixty (60) days following the date such vacancy arises, the party to which the legislator of the vacant office belonged has [not] presented a candidate [slate]* to fill such office, the office shall [not] be deemed to be that of an independent legislator, to the effects of holding the by-election to fill it."

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* [See Translator's note on p. 9.]

One is obliged to conclude that it is the right of the political party affected by the vacancy to fill it in time by means of "the presentation of a slate." Once presented, no other nomination of independent candidates need be considered for the election.

The third paragraph of the statute clearly explains the consequences arising from a political party's failure to present a slate within those 60 days and tends to corroborate what is stated herein. To that effect, the office shall be deemed to be that of an independent legislator, in which case, "any elector affiliated to a political party or duly qualified as an elector, who fulfills the requirements of such office, may be presented as a candidate in said election." (Underscore supplied.) Contrariwise, if the political party chooses to present its slate to the electorate, no other candidates affiliated to other parties or independent candidates can be nominated.

Finally, the fourth paragraph covers the situation arising from a vacancy occuring within 15 months preceding a general election, and establishes that it shall be filled by the President of the proper legislative Body by nomination of the political party that the representative that caused the vacancy belonged to. One can easily detect the statutory difference when the Legislative Assembly dealt with a vacancy prior to the 15 months preceding a general election as is the case at bar, or when it occurs within the 15 months preceding said general election. This dissimilarity gives us firm ground on which to sustain, as we have concluded, the Governor's obligation to call a by-election in Representative District No. 31, without there being grounds to award the same by virtue of a direct nomination of the party involved in presenting only one candidate. (Underscore supplied.)

"When read in the light of its historical background,"[2] we find that the concept by-election established in arts. 5.006 and 5.007 of the Electoral Law in force is not new and has its constitutional origin in Art. III, Sec. 8, of the Fundamental Law that required the holding of said event to fill the vacancies for the office of senator or representative for a district. It was so until it was amended in 1964. Then as now, in its meaning, this term is unyieldingly tied to total participation by an electorate, contrary to what the honorable trial court resolved, it cannot be assimilated to or equated with a primary, whose scope is limited to bona fide affiliated members of the political party that is holding the same. Notice that the law establishes and recognizes the semantic and substantive differences between "primaries" and "by-elections." Both are comprised within a major generic concept, but strictly they are not the same thing. The presence of important variables with regard to their aims, characteristics and protagonists moved the lawmaker to conceptualize and treat them separately in an individual and distinctive manner: "Election," he said, "shall mean the general election, primaries, referenda, plebiscites, or by-elections." (Underscore supplied.) Article 1.003(14). 16 L.P.R.A. §3003(14). The common denominator uniting them is the active, total or partial participation of the electorate in the voting process, something significantly different from the method of direct nomination without an election.

It is a hermeneutical principle that a court is not authorized, under the pretext of looking for the legislative intent, to add limitations or restrictions which do not appear in a statute. *Román* v. *Superintendent of Police*, 93 P.R.R. 667 (1966). Therefore, we cannot lessen the participation of all the electorate of Representative District No. 31. To this respect, we emphasize art. 5.007 which reads: "All electors entitled to vote within the geographic district in which the by-election is to be held, pursuant to the call issued by the Governor to such effect, shall vote in a by-election." (Underscore supplied.) 16 L.P.R.A. §3207. The history of this article defeats said contention. Aside from a few stylistic differences, the language

[2] *Municipality* v. *Fernós, Commissioner*, 63 P.R.R. 940, 944 (1944).

of this article contains, in essence, the text that was in force under sec. 2 of Act No. 20 of August 22, 1952, when the constitutional provision of "by-election" governed. It then read:

> There shall be entitled to vote in such by-election all voters appearing in the poll lists used in the immediately preceding general election in such district, or in all of Puerto Rico, in case the vacancy to be filled is one of Senator or Representative at large elected as independent candidate. 16 L.P.R.A. §442. (Underscore supplied.)

We must reiterate that, in the past as well as in the present, the term by-election denotes and represents the holding of a singular election in which all the electors can participate. The phrase "entitled to vote . . . pursuant to the call issued by the Governor to such effect" does not vitiate the concept. This does not imply that it grants the Governor the authority or discretion to limit the participation of said electorate to an exclusive participation of affiliates of a given party. Such a proposal would encounter grave and well-grounded objections, of a constitutional nature, by virtue of an improper delegation of Legislative Power to the Executive Branch, in the absence of the necessary parameters as outlined in the leading case of *López* v. *Planning Board,* 80 P.R.R. 625, 637 (1958), and reiterated in *Hernández Montero* v. *Cuevas, Director,* 88 P.R.R. 767 (1963). The fact that the Act does not provide clear norms or guidelines is precisely what has led the Governor to interpret it in a completely contradictory and unreconcilable manner in the previous two calls issued. The Governor's intervention cannot extend itself beyond the ministerial act of simple executor as assigned by law.

We respectfully disagree with the majority thesis of this Court, in the sense that a by-election is not mandatory, but suppletory; that it need not be held if the political party concerned proposes a candidate within 60 days. Once again the evolution of the statute impedes us from subscribing to said interpretation. The crucial wording on which said proposal is based is that which reads: "If within sixty (60) days following

the date such vacancy arises, the party to which the legislator of the vacant office belonged has not presented a candidate* to fill such office, the office shall be deemed to be that of an independent legislator, to the effects of holding the by-election to fill it." (Underscored supplied.)

We have argued that the key word is "slate," which the Electoral Law defines as "all candidates of a political party appearing on the electoral ballot in the column corresponding to that party." The lawmaker coined and chose to use that precise and specific term that engulfs several candidates of one given political party. Consequently, the statutory definition is compatible and congruent with the method as designed and the mechanism of a plurality of candidates of a single party for the selection to the office. Nevertheless, said construction is dismissed. The end result is that the Court now substitutes the word "candidate" for "slate," notwithstanding the fact that said word was widely used in the Legislative Assembly and was present and defined by the very act. Article 1.003(7) and (5), respectively.

In an effort to decipher this confusing statutory provision, we have noticed that the same contains a certain language that harbors some similarity with the semantics and wording that sec. 5 of the aforementioned Act No. 20, that was repealed, had while said constitutional text prevailed. To that effect it read in its pertinent part:

> Any principal political party or any party by petition which has been legally registered may, through a duly-called convention, nominate a candidate to fill the vacancy to which the by-election refers. Said convention shall be held not later than sixty days prior to the election, and the chairman and the secretary of the central directing body of the political party nominating the candidate shall certify his name to the Secretary of State at least fifty-five days before the election. Should the said party fail to

[*Translator's note: In the official English translation of the Electoral Law the word "candidatura" in sec. 5.006 is translated as "a candidate" and not as "candidacy" or "slate."]

> do so, it shall then forfeit its right to nominate its candidate. No party shall nominate more than one candidate for each office. If a party nominates two candidates for each office, its central directing body shall decide which candidate is to appear on the voting ballot, at least fifty days prior to the election. The Secretary of State shall govern himself by said decision, and in case said party does not decide within the aforementioned term, the candidate nominated in first instance shall be considered as the candidate of the said party. 16 L.P.R.A. § 445 (underscored supplied).

That procedure—that was easily in accordance with the constitutional requirement of a by-election as the means by which to fill vacancies—at the time gave the party in question the option of presenting "a candidate." Even then if the party in question did not do so within the term of 55 days, it forfeited its right to *nominate* "its candidate" that would appear in the electoral ballot. This again makes manifest the difference and the legislative treatment attributed to the terms "candidate" and "slate" in the present act. In changing the language and phraseology of a statute it should be presumed that the lawmaker intended to enact a new rule, to reach certain results and effect some purposes. *Commonwealth, ex rel. Lektrich* v. *Ydrach,* 77 P.R.R. 38 (1954). Said amendment or re-enactment—by adding or supplying concepts—constitutes evidence of the intention of altering its meaning. *People* v. *Villalba,* 86 P.R.R. 301 (1962).

When this Court construes that if a party selects a candidate it is then unnecessary to call a by-election, what it does in reality is to equate said method with what is provided in the fourth paragraph of the act with regard to filling vacancies occurring in the office of senators or representatives-at-large, or of a district that arose *within* the fifteen (15) months preceding a general election.

There are no grounds on which to base such an analogy. To cover this last situation, the Legislative Assembly provided a

different mechanism and established certain distinctive parameters. It could well have extended the method to cover a vacancy for representative of a district but did not do so. We cannot attribute to the Legislative Assembly such a *brutum fulmen.*

II

In accordance with our duty to sustain—whenever possible—the validity and constitutionality of a law, we have elaborated a construction that we deem may reconcile the conflicting views: the right of all the electors and the interests of the political parties. This construction faithfully follows and reflects the wording and statutory definitions, taking also into account the logical elements involved.

We admit that the method that we perceive in said act tends to remove itself from the classic method of primaries or of the traditionally utilized direct nomination method. However, it has its objectionable points. This makes it very difficult to grasp its meaning and, at first glance, sets off certain preoccupations with regard to the validity of obliging the political parties—under the presumption of there being only one candidate interested—to submit a slate, in other words, more than two candidates. Also in question is if one can limit the right of unaffiliated electors to vote for the candidates of that party. These doubts recede when one takes into account that under the prevailing constitutional mandate it is incumbent upon the Legislative Assembly—subject to certain limitations and based on the existing methods present—to determine which method it deems proper, to wit: (a) to dispense with the political party that originally nominated the legislator by means of an *election open* to all parties, candidates and electors of the District in question; (b) excluding part of the electorate by means of *primaries* limited to bona fide candidates and electors affiliated to the party in question; (c) eliminating all the electorate through a *direct nomination* of a candidate; and (d) *a partial or total combination* of any of these methods (by-election).

Surely, if the Legislative Assembly can in law exclude the political party that originally nominated the legislator (open election), or eliminate the totality of the electorate (direct nomination) or part of the same (primaries), it could well sanction and design a *combined* method of them that would provide limited alternatives under some requirements and options. Our dissent is not with regard to the possible methods that the Legislature could draw, but with the construction and reading that has been made of the *present statute*. In any case, the wisdom of such a method is foreign to our jurisdiction, since "the distinction of laws into odious or favorable with a view of limiting or extending their provisions, shall not be made by those whose duty is to interpret them." Art. 21, Civil Code, 31 L.P.R.A. § 21. Even when said statute is deemed unwise, we cannot endorse a solution that by favoring the political parties would relegate to a secondary role all the electorate of a representative district and limit a statutory right. In hermeneutical matters of electoral-constitutional dimensions we favor the strict scrutiny and the maximum protection permissible within a democracy.

In its operational dynamics, the interpretation of the majority has the immediate consequence of depriving the electorate of Representative District No. 31 of the right to participate in the by-election. In the long run it would also inhibit the rest of the electors in similar situations concerning future vacancies, because it is deceptive and utopic to expect that the political parties would not nominate its candidate within the 60 day term and give way to what the court termed as the "second alternative."

In a recent decision we admitted the importance of the political parties, but clarified that they "are a means and not and [sic] end. . . . The main subject of the modern controlled electoral-constitutional system is the individual voter. The party is not the ultimate element but a vehicle of individual expression which, along with other elements, implements the collective expression of the citizenry. Hence, all statutes regulating the elective franchise have been directed to acknowledge 'the prevalence of the citizens' voting rights over the rights and prerogatives of all the political parties and groups.' [sic]

Art. 2.001(11) 16 L.P.R.A. § 3051(11). In the final analysis, this individual right is the crux of the system and as a matter of public interest, it should be safeguarded against possible injustices from clashing partisan interests." *P.S.P.* v. *Comisión Estatal de Elecciones,* 110 D.P.R. ____ (1980). (Underscore supplied.)

In keeping with this perspective we hold that—save the inevitable application of a different and express constitutional design, *García Passalacqua* v. *Tribunal Electoral,* 105 D.P.R. 49 (1976)—the hermeneutic rule par excellence that should prevail in the area of elections—when the interests of a political party clash with those of an electorate—is that in which the latter is given preference. In the case at bar, the strict construction of the statute defeats that view when it could have avoided subordinating the right of the electors to participate in an election to fill a vacancy. In their quest to fill the existing gaps and solve the contradictions that arise from that construction—and reconcile them with the results—the last exposition of the majority opinion, in an eminently legislative way and invoking the concept of fairness, has formulated—more than a procedure—a new wording of a substantial part of article 5.006. This necessarily inverts the chronology of the legal terminology originally foreseen, redefining and establishing a different method than was contemplated, limiting the powers of the Executive Branch and eliminating the participation of the citizenry in the process, for the benefit of the political parties.

With all due respect we consider that the restricing [sic] construction of the Court places the statute on the brink of unconstitutionality. In our mission of promoting the constitutionality of every law—*Negrón Soto* v. *Gobernador,* 110 D.P.R. ____ (1981)—we should avoid this possibility. The way of avoiding this is reading what article 5.006 *states,* and consequently, stating that the Court will create a method that will protect the political party that held the office in question by calling for an election circumscribed to affiliated candidates, but with the participation of all the electorate of the corresponding district.

(Translation)

APPENDIX C

IN THE

Supreme Court of Puerto Rico

0-81-150
R-81-118

POPULAR DEMOCRATIC PARTY,
Plaintiff and appellee

v.

CARLOS ROMERO BARCELÓ *et al.*,
Interveners and appellants

POPULAR DEMOCRATIC PARTY,
Plaintiff and appellee

v.

CARLOS ROMERO BARCELÓ,
Governor of Puerto Rico,
Defendant and appellant

GERINELDO BARRETO PÉREZ, *etc.*,
Defendant and appellee

JUDGMENT

San Juan, Puerto Rico, May 8, 1981

Pursuant to the foregoing per curiam opinion, judgment is rendered modifying the judgment below in order to give appellee a thirty-day term from the service of notice of this judgment to present before the Commonwealth Elections Commission a slate to fill the vacancy in Representative District No.

31. If said slate is limited to only one candidate, he shall be certified by the General Administrator of Elections as the person entitled to hold the vacant seat. If the slate includes more than one candidate, the Governor shall, within a fifteen-day term after the presentation of the slate, call a by-election where only the persons mentioned in the slate may run for office, without the participation of candidates of other parties or of independent candidates. If the appellee does not present a slate within the above-mentioned thirty-day term, the Governor shall, within the next fifteen days after the term has expired, call a by-election where persons affiliated to any political party or independent candidates who meet the office's requirements, may run for office. In the event that there is a by-election, all qualified electors of Representative District No. 31 shall be entitled to vote. The by-election shall be held within a forty-five-day term from the call issued by the Governor.

It was so agreed and ordered by the Court and certified by the Clerk. Mr. Justice Rigau concurs with the opinion of the Court but reserves his right to pronounce himself if he deems it necessary because he believes that, if we are dealing with the substitution of an elected representative who died, both the slate and the voters should be members bona fide of the party to which the deceased representative belonged. Mr. Justice Irizarry Unqué concurs with the opinion but issued a separate opinion where he states that only the electors of the party which won the vacant seat should be entitled to participate in the by-election. Mr. Justice Dávila issued a separate opinion concurring in part with the opinion of the Court. Mr. Justice Martín issued a dissenting opinion. Mr. Justice Negrón García, with whom Mr. Justice Martín joined, issued a dissenting opinion.

(Translation)

APPENDIX D

No. R-81-118
No. 0-81-150
(Consolidated)

POPULAR DEMOCRATIC PARTY,
Plaintiff-appellee

v.

CARLOS ROMERO BARCELÓ,
Governor of Puerto Rico,
Defendant-appellant

GERINELDO BARRETO PÉREZ,
General Administrator of Elections,
Defendant-appellee

POPULAR DEMOCRATIC PARTY,
Plaintiff-appellee

v.

CARLOS ROMERO BARCELÓ *et al.*,
Intervenors-appellants

RESOLUTION

San Juan, Puerto Rico, May 27, 1981

The motions for reconsideration dated May 14 and May 22, 1981, are denied.

It was so agreed by the Court and certified by the Clerk. Mr. Justice Dávila reaffirms himself in the position expressed in his separate opinion. Mr. Justice Martín and Mr. Justice Negrón García would reconsider according to the expressions set down in their respective opinions.

Ernesto L. Chiesa
Chief Clerk

(Translation)

APPENDIX E

IN THE

Supreme Court of Puerto Rico

R-81-118
0-81-150
(Consolidated)

POPULAR DEMOCRATIC PARTY,
Plaintiff-appellee

v.

CARLOS ROMERO BARCELO,
Governor of Puerto Rico and
GERINELDO BARRETO PEREZ,
General Administrator of Elections,
Defendants and appellant
the former
POPULAR DEMOCRATIC PARTY,
Plaintiff-appellee

v.

Review Appeal

CARLOS ROMERO BARCELO and
GERINELDO BARRETO PEREZ,
Defendants
JESÚS RIVERA RODRÍGUEZ,
FUNDADOR DÍAZ CRUZ,
LÓPEZ BATALLA,
INOCENCIO QUINTERO RIVERA,
SANTOS REYES REYES,
ANTONIO RIVERA CARRASQUILLO,
HERIBERTO MÉNDEZ VELÁZQUEZ,
SERGIO RIVERA RODRÍGUEZ,
HÉCTOR BERMÚDEZ ALICEA, and
ROBERTO ORTIZ HERNÁNDEZ,
Intervenors-appellants

NOTICE OF APPEAL

This Hon. Court is hereby informed that the intervenors-appellants in the case at bar appeal before the U.S. Supreme Court from the judgment rendered by this Hon. Court on May 8, 1981, upholding the validity of sections 5.006 and 5.007 of the Puerto Rico Electoral Law, thus injuring the intervenors right to vote, contrary to the First, Fifth, and Fourteenth Amendments to the U.S. Constitution. This appeal is based on the jurisdiction granted by 28 U.S.C. § 1258(2).

In San Juan, Puerto Rico, this 28th day of May 1981.

CORDOVA, SUBIRA, GAZTAMBIDE
& ARRILLAGA
Attorneys for Intervenors-Appellants
Box 1070
San Juan, Puerto Rico 00902
Telephone: 756-6065

_____
Jorge L. Cordova, Jr.

I CERTIFY: That I sent by regular mail a true and exact copy of this Notice to attorneys Miguel Pagán, Héctor Urgell Cuebas, and Guillermo Mojica Maldonado to their known addresses on this 28th day of May 1981.

(sgd.) _____
Jorge L. Cordova, Jr.

(Translation)

APPENDIX F

STATUTES INVOLVED

§ 5.006 of the Electoral Law of Puerto Rico, 16 L.P.R.A. § 3206:

By-elections

When a vacancy occurs in the office of a senator or representative elected as an independent candidate for a district, or when a vacancy occurs in the office of senator or representative for a district, nominated by a party before the fifteen (15) months immediately preceding the date of the following general election, the Governor, with the advice of the Commission shall, within the thirty (30) days following the date on which the vacancy occurred, call a by-election in such district which shall be held no later than ninety (90) days after the date of the call, and the person elected in such by-election shall hold the office until the term of his predecessor has expired.

If within sixty (60) days following the date such vacancy arises, the party to which the legislator of the vacant office belonged has not presented a candidate to fill such office, the office shall be deemed to be that of an independent legislator, to the effects of holding the by-election to fill it.

In the event the vacancy is that of an independent candidate, any elector affiliated to a political party or duly qualified as an elector, who fulfills the requirements of such office, may be presented as a candidate in said election.

Whenever a vacancy occurs in the office of a senator or representative-at-large who had been nominated by a party, or when, within the fifteen months preceding a general election a vacancy occurs in the office of senator or representative of a district, it shall be filled by the President of the proper Body

by nomination of the political party such senator or representative belonged to, with a person selected in the same manner as his predecessor.

§ 5.007 of the Electoral Law of Puerto Rico, 16 L.P.R.A. § 3207:

Persons entitled to vote at by-election

All electors entitled to vote within the geographic district in which the by-election is to be held, pursuant to the call issued by the Governor to such effect, shall vote in a by-election.

APPENDIX G

PROVISIONS FOR FILLING VACANCIES IN THE STATE LEGISLATURES

State	Applicable Statute or Constitutional Provision	Term of Senate (years)	Term of House (years)	Election Required	No Election Required	Party Controls Replacement
Alabama	Ala. Code tit. 17, § 17-18-1	4	4	X		
Alaska	Alaska Stat. §§ 15.40.320, 15.40.330, 15.40.360, 15.40.370, 15.40.380	4	2	X(a)		X
Arizona	Ariz. Rev. Stat. Ann. § 41-1201	2	2	X		
Arkansas	Ark. Const. art. V, § 6	4	2	X		
California	Cal. Const. art. IV, § 2(d)	4	2	X		
Colorado	Colo. Rev. Stat. § 1-11-103	4	2		X	X
Connecticut	Conn. Gen. Stat. § 9-215	2	2	X		
Delaware	Del. Code tit. 15, § 7101	4	2	X		
D.C.	D.C. Code § 1-141(d)(1)	4(b)	4(b)	X		
Florida	Fla. Stat. §§ 100.101, 100.111	4	2	X		
Georgia	Ga. Code § 34-805	2	2	X		
Hawaii	Haw. Rev. Stat. §§ 17-3, 17-4	4	2		X(c)	X
Idaho	Idaho Code § 59-904A	2	2		X	X
Illinois	Ill. Rev. Stat. ch. 46 § 25-6	4 or 2(d)	2		X	X
Indiana	Ind. Code Ann. § 2-2.1-2-1	4	2		X(e)	X

State	Applicable Statute or Constitutional Provision	Term of Senate (years)	Term of House (years)	Election Required	No Election Required	Party Controls Replacement
Iowa	Iowa Code Ann. § 69.14	4	2	X		
Kansas	Kan. Stat. § 25-312	4	2		X	
Kentucky	Ky. Rev. Stat. § 121.030	4	2	X		
Louisiana	La. Rev. Stat. Ann. § 601	4	4	X(f)		
Maine	Me. Rev. Stat. tit. 21, §§ 1501, 1502	2	2	X		
Maryland	Md. Const. art. III. § 13	4	4		X	X
Massachusetts	Mass. Ann. Laws ch. 54, § 141	2	2	X		
Michigan	Mich. Const. art. V, § 13	4	2	X		
Minnesota	Minn. Stat. § 202A.61	4	2	X		
Mississippi	Miss. Code Ann. § 23-5-201	4	4	X		
Missouri	Mo. Rev. Stat. § 21.110	4	2	X		
Montana	Mont. Rev. Codes Ann. § 5-2-402	4	2		X(g)	X
Nebraska	Neb. Rev. Stat. § 32-1042	4(h)	4(h)		X	
Nevada	Nev. Const. art. 4, § 12	4	2	X(i)		
New Hampshire	N.H. Const. pt. 2, Arts. 16, 34	2	2	X		
New Jersey	N.J. Stat. Ann. § 19:3-28	4	2	X		
New Mexico	N.M. Stat. Ann. 2-7-9(B), 2-8-9(B) (1978)	4	2		X(g)	

State	Applicable Statute or Constitutional Provision	Term of Senate (years)	Term of House (years)	Election Required	No Election Required	Party Controls Replacement
New York	Const. art. 13, §3; NY Public Officers Law (Consol.) § 42	2	2		X	
North Dakota	N.D. Cent. Code § 16-07-09	4	2	X		
North Carolina	N.C. Gen. Stat. § 163-11	2	2		X(j)	X
Ohio	Ohio Const., Art. II, § 11	4	2	X(k)		X
Oklahoma	Okla. Stat. Ann. (Supp.) tit. 26, § 12-106	4	2	X		
Oregon	Or. Rev. Stat. § 171.050	4	2		X(l)	X
Pennsylvania	Pa. Stat. Ann. tit. 25, § 2778	4	2	X		
Rhode Island	R.I. Gen. Laws § 17-3-6	2	2	X		
South Carolina	S.C. Const. art. II, § 25	4	2	X		
South Dakota	S.D. Const. art. III, § 10	2	2		X	
Tennessee	Tenn. Code Ann. § 2-14-201	4	2	X(m)		
Texas	Tex. Const. art. 3, § 13	4	2	X		
Utah	Utah Code Ann. § 20-1-5	4	2		X	X
Vermont	Vt. Stat. Ann. tit. 17 § 2623	2	2		X	
Virginia	Va. Code § 24.1-16	4	2	X		
Washington	Wash. Const. Amend. 52, art. II, § 15	4	2		X(g)	X
West Virginia	W. Va. Code § 3-10-5	4	2		X	X

State	Applicable Statute or Constitutional Provision	Term of Senate (years)	Term of House (years)	Election Required	No Election Required	Party Controls Replacement
Wisconsin	Wis. Stat. Ann. § 17.19(1)	4	2	X		
Wyoming	Wyo. Stat. § 22-18-111 (a)(ii)	4	2		X(n)	

(a) The Governor makes appointments to house of representatives for remainder of unexpired term. If unexpired senate term is less than 2 years 5 months, the Governor makes appointment. If longer, the Governor shall call a special election.

(b) Unicameral Council members elected for 4 years.

(c) See statute for special circumstances for state senators.

(d) Districts divided into thirds; one group elected for 4 yrs, 4 yrs, 2 yrs; second group 4 yrs, 2 yrs, 4 yrs; third group 2 yrs, 4 yrs, 4 yrs.

(e) Selected by vote of precinct committeemen representing same political party.

(f) If 6 months or more remain in unexpired term.

(g) Appointment by board of county commissioners.

(h) Unicameral Legislature.

(i) Elected if biennial or regular election takes place between time of vacancy and next legislative session; if no such election is scheduled, board of county commissioners appoints person of same political party.

(j) Recommendation by county executive committee or district committee of the vacating member's political party.

(k) Vacancy filled by election by members of legislative body affiliated with same political party.

(l) See special provisions.

(m) If 12 months or more remain prior to next general election.

(n) Board of county commissioners makes temporary appointment; general elections held every 2 yrs.

Appendix

Passalacqua

81-328

CHIEF CLERK'S CERTIFICATE

I, Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed documents are photocopies of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinions rendered by this Court in case No. 0-76-302 of August 13, 1976, García Passalacqua v. Electoral Tribunal, and case No. 0-73-469 of May 31, 1974, Fuster v. Busó, the originals of which, in Spanish, are under my custody in this Office.

IN WITNESS WHEREOF, at the request of the interested party, I issue these presents for official use, free of charge, under my hand and the seal of this Court in San Juan, Puerto Rico, this 20th day of November 1981.

Lady Alfonso de Cumpiano
Chief Clerk
Supreme Court of Puerto Rico

IN THE SUPREME COURT OF PUERTO RICO

Juan M. García-Passalacqua,

Petitioner

v. No. O-76-302

Electoral Tribunal, Review

Respondent

MR. JUSTICE NEGRON GARCIA delivered the opinion of the Court.

San Juan, Puerto Rico, August 13, 1976

In view of the constitutional principle that the Puerto Rican political system is organized on a fully democratic foundation, and of its close relationship with the certainty and stability of the electoral process, we agreed to issue the present writ of review and decide it on the merits.[1]

Petitioner Juan M. García Passalacqua challenges Rules 3.1.1 and 5.2.2(d)[2] promulgated by the Electoral Tribunal to regulate

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[1] To a previous petition brought by the same petitioner (Juan M. García Passalacqua v. Electoral Tribunal, O-76-11) in which identical questions were raised regarding the Regulations for Primaries, we refused to issue the writ by Order of January 29, 1976.

[2] They provide:

"R. 3.1.1- Special Certification of the Political Party regarding its candidates for Senators and Representatives at-Large.-

the election of at-large candidates in the coming election, on the grounds that they are unconstitutional. In synthesis, these

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"Upon filing the oaths of the Party's candidates for representatives and senators at-large, as provided by art. 7-002 of the Code, the President and Secretary shall certify the list of the party's candidates for those offices, following a specific order for each precinct. It shall be the duty of the Electoral Tribunal to direct that the names of said candidates be printed on the electoral ballot of each precinct, strictly following the order in which they were certified to the Tribunal by each party.

"R. 5.2.2- How to vote.-

"a. . . . . .

"b. . . . . .

"c. . . . . .

"d. How to Vote for Legislators at-Large: The voter may vote for the candidate for Senator or Representative at-Large of his choice as follows: (1) by voting the straight ticket of the party, in which case it shall be understood that it was his intention to vote for the candidate whose name, in the order of printing of the electoral ballot, appears in first place for said offices; (2) he may also show his intention to vote for some other candidate who is not the one appearing in first place in the order of printing of the ballot, when in addition to marking the electoral ballot in favor of the emblem of a particular party, he makes besides some cross or mark alongside the name or the emblem of an at-large candidate, in which

rules authorize political parties to nominate up to eleven (11) candidates to such offices; permit the parties to choose the precinct in which a specific candidate will appear first in the electoral ballot; and establish that the straight vote for a political party will be adjudicated to the candidate who appears first.

Petitioner supports his contentions arguing that the Constitutional Convention expressly rejected the practice of the political parties of reducing the number of candidates to be nominated for at-large offices; that the Electoral Code in force repealed the section of the former law which permitted political parties to choose the precincts at which each one would appear, substituting it by art. 1-003, subdivisions 27 and 28 (16 L.P.R.A. § 2003(27) and (28)); and that such rules violate the constitutional rights of freedom of expression and association, the equal protection of the laws and the precept that the vote be equal, direct, and secret. Finally, he assigns, as main objection, that the latter constitutes an illegal extra-official reapportionment which contravenes the provisions of Sec. 4 of Art. III of the Constitution which entrusts the Constitutional Board for the Revision of Senatorial and Representative Electoral Districts with the task of revising the districts.

The Electoral Tribunal, the Popular Democratic Party, and the New Progressive Party filed their respective briefs within the term granted presenting several arguments against such contentions. The Puerto Rican Socialist Party did not file any, requesting a hearing, which we denied on August 4, in consideration of the fact that our Order of July 13, 1976--notice of which was

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case, this mark shall be understood to mean that it was the intention of the voter to vote for the candidate thus marked."

served on the 14th upon its Electoral Solicitor--warned all the parties, that once the term to appear had elapsed, the case would be submitted for a decision on the merits.

I

In its historico-juridical perspective, the idea of the office and the election of at-large legislators in Puerto Rico is a combination of the system of proportional and territorial representation, which goes back to the Organic Act of 1917, which in its arts. 26 and 27 respectively--in addition to the fixed members corresponding to the senatorial and representative districts--provided for the election of five senators and four representatives at-large. The law approved then to regulate the proceeding concerning the election process was Act No. 79 of June 25, 1919--entitled Election and Registration Law--which in its sec. 43 ordered the separate printing of two types of ballots: one the "general ballot" to be used for every elective office, except for the at-large candidates who were indicated and voted on a "special ballot." The law did not mention anything as to the political parties' intervention regarding the order of printing of said candidates on the ballot.

This section was amended by Act No. 64 of May 8, 1936 eliminating the two ballots and providing for only one ballot known as "electoral ballot," which would contain ". . . the names of all the candidates for election in each municipality and precinct of the Island." In regard to the at-large candidates it was clarified that ". . . the General Supervisor of Elections shall direct that the names of the senators and representatives at large be printed in the same sequence that they were certified to him for each municipality or precinct by the central directing

organization of the party having the right to nominate said candidates"; and, besides, sec. 37(a), containing the following language, was added: "The political parties, in issuing the certificates in connection with the candidates for senators and representatives at large, shall do so by election precincts, and it shall be the duty of the General Supervisor of Elections to direct that the names of the said candidates be printed on the electoral ballot in the same order that they were certified to the Executive Secretary of Puerto Rico by the central directing bodies of the principal parties, or by the parties by petition."

The method of choosing at-large candidates and the afore-copied texts of the law remained unaltered before, during, and after the approval of the Constitution until the Electoral Code (Act No. 1 of February 13, 1974: 16 L.P.R.A. § 2001 et seq.) became effective.

The dossier of the Constitutional Convention shows that the organization, composition, and procedure of the legislative body and the selection of its members underwent ample study and deliberation.[3] In support of his contention to the effect that the system of election of at-large candidates was repudiated by said forum, petitioner relies on the recommendations contained in the report prepared by the School of Public Administration of the Social Sciences Faculty of the U.P.R. which is part of the compilation published under the title of La Nueva Constitución de Puerto Rico, and on the results of the votes on an amendment proposed to the Constitutional Assembly by delegate José Rosario Gelpí.

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[3] See: Informe Complementario de la Comisión de la Rama Legislativa, 4 Diario de Sesiones de la Convención Constituyente 2590 (Equity ed. 1961).

The report of the School of Public Administration states that:

"The election of representatives and senators at-large assures greater proportion in the representation. Nowadays, and pursuant to the provisions of the Organic Act, nine of the fifty-eight members of the bicameral legislature are elected on the basis that each voter may vote for only one of the candidates proposed by the respective parties to the whole Island, without limitations with regard to districts. The number of legislators to be elected in this manner should be increased. And the minorities would thus be offered better opportunities to elect a percentage of representatives that is in harmony with the number of votes cast for each one. This reform would also make possible the election of more men with a general endorsement, who do not depend so much on the local organizations of the parties.

"It would be proper to consider, however, the establishment of a purer system of proportional representation for the election of the said delegates. The one now in existence forces the parties to divide the island, extraofficially, in districts, presenting in each sector the corresponding candidates, so that the total number of votes be equally apportioned and none of the candidates fails to be elected due to a mere error of computation. It is actually a combination of the proportional system with the territorial system, which to a certain extent forces the candidates to rely on regional endorsement and

lends itself to injustices due to electoral mathematics. The vote by lists, legally established, would be better to choose said legislators. According to said list system, each party could nominate its candidates in order of preference, and the voters would cast their votes by parties, each one of them choosing a number of candidates from each list equivalent to the percentage of votes cast." Op. cit. at 264-65 (Italics ours).

In short, the following observations and indications were made to the Constitutional Assembly: the need to correct the electoral situation of the minority parties, warranting their presence in the Legislature: an increase in the number of at-large legislative seats as a means of warranting greater proportionality: acknowledgment and critical examination of the prevailing system for the election of said offices by which the political parties divided the Island, extraofficially, into several electoral districts: and substitution of the system for a list system.

Said recommendations were only partially adopted, inasmuch as the present composition and organization of the Legislature was established following substantially the substitute proposal made by the Committee in question, which read thus:

"Section 1. The Senate shall be composed of twenty-seven senators and the House of Representatives of fifty-one representatives, [except when said number is increased in any of the Houses by virtue of the provisions of sec. 4].

"Section 2. For the purposes of election of members of the Legislature, Puerto Rico shall be divided into eight senatorial districts each of which shall elect two senators, and into forty representative districts,

each of which shall elect one representative: each senatorial district being composed of five representative districts.

"Eleven senators at-large and eleven representatives at-large shall be elected also, and the candidates with the greater number of votes cast for said offices shall result elected. Each elector shall not vote for more than one candidate for senator at-large nor for more than one candidate for representative at-large."

2 Diario de Sesiones de la Convención Constituyente de Puerto Rico 1274.

By virtue of this provision, together with section 7, the regular members in both Houses and the offices for candidates at-large were increased and, as exception to the basic numerical composition, the representation of minority parties was envisaged and authorized.

There is no evidence of any repudiation whatsoever on the part of the Constitutional Convention of the system of designation and selection of at-large candidates by the political parties. Petitioner's contention to that effect is erroneous. Delegate Gelpí tried unsuccessfully to eliminate the offices of at-large senators and representatives, stating as ground thereof that the electoral ballot would be too "big," proposing a system, which in his judgment, was less complicated than the one which was under consideration and finally approved. His amendment sought to divide the Island into eight electoral districts, it assigned twenty-four (24) seats to the Senate and fifty-six (56) to the House and provided that each political party--even when it could nominate three (3) candidates to the Senate and seven (7) to the House for each district--could not elect more than two (2) senators

nor more than five (5) representatives, regardless of the number of votes it had obtained, in view of which the three (3) candidates to the Senate and the seven (7) representatives of the other political parties having obtained the greater number of votes in the corresponding electoral district would result elected. 4 Diario de Sesiones de la Convención Constituyente 1279-1280; 1286-1288.

It was in harmony with the above-described arrangement that the said delegate proposed the text upon which petitioner based his contention, to wit: "Each party or political organization which had nominated candidates for senators or representatives or for both offices, shall specify the order in which it desires its respective candidates to appear in the official ballot, by electoral districts or municipalities as well." Said amendment just as the rest of the proposal, was defeated by the Assembly.

From the foregoing, it stands out that the amendment did not refer nor could be applied to the candidates for legislators at-large. It was an integral part of a total proposal which, precisely, among its objectives, eliminated the existence of such offices. Therefore, it is erroneous to consider this incident as a repudiation of the system prevailing at the time when the Constitution was considered and approved.

Contrary to petitioner's position, said debate and the subsequent one lead us to conclude that the drafters of our Constitution did not declare themselves against eliminating the at-large offices and of substituting the election system in force, of which they were conscious:

> "Mr. GELPI: . . . [E]ach party [is] authorized to present eleven names for representatives and eleven candidates for senators. Now then, that

afterwards each party chooses any smaller number of candidates, is something quite different. But the law is the law. And votings were previously made--and it was at my proposal, I was the one who drafted that bill to the effect that the candidates at-large would be placed by municipalities in the order desired by each political party and that the voter who cannot read or write and votes under the emblem, is casting his vote for the candidate appearing first in the municipality where he is voting. I made that amendment to the election law. That is why I know that procedure better than many others.

Mr. RIVERA REYES: Mr. Chairman: a question to the colleague. I would like the colleague to tell me where does it say here in this substitute bill that each party is going to choose eleven candidates at-large for representatives and eleven for senators.

Mr. GELPI: It says: 'There shall also be eleven senators at-large and eleven representatives at-large . . .'

Mr. RIVERA REYES: . . . Now what I would like to know is, I would like the colleague's statement clarified: That each party is going to have eleven candidates at-large for representatives and senators.

Mr. GELPI: But the law says so, and so does the constitution that is being drafted here, unless the Chairman of the Committee says that what I am saying is false, let's see whether or not each party is entitled to present eleven candidates at-large for representatives and eleven candidates for the Senate.

Mr. RIVERA REYES: To be entitled, does that mean that according to the colleague, that it is entitled, is that what it says here at page two, line two, in the sentence that follows therein?

Mr. GELPI: Yes, sir, and all the candidates who obtained most of the votes would be elected. Then there are eleven. Not one.

Mr. RIVERA REYES: Eleven for all the parties. Ah! Eleven for all the parties.

Mr. GELPI: Of course, each party is entitled to elect eleven. To nominate eleven candidates, yes, sir. The word I have used should be to 'nominate' candidates." Op. cit. 1289. (Italics ours.)

[1] To sum up, it is inescapable to conclude that: the Constitutional Assembly made no pronouncement against the practice challenged by petitioner; it did not follow all the recommendations of the report of the School of Public Administration; it did not change the well-known system of selecting candidates at-large with the intervention of the political parties; and the at-large offices were increased to eleven (11) in each Legislative House. Consequently we hold, that the constitutional right of the political parties to nominate eleven (11) candidates at-large is not tantamount nor does it translates into an electoral obligation to nominate such number. This conclusion is the only one which is in consonance with one of the basic objectives which encouraged the Constitutional Convention, to know that the minority parties had an opportunity to be represented in the Legislature. The nomination of less than eleven (11) at-large candidates for legislative offices by a majority party, has the immediate

effect that the candidates at-large of the other parties may occupy the remaining offices according to the number of votes obtained.

II

Having in mind the historico-constitutional trajectory, let us analyze the argument in the sense that the rules adopted by the Electoral Tribunal are unlawful because the Electoral Code has repealed the provisions of the former law which permitted ". . . the political parties to choose the precinct at which each one of them would run and adopted, instead, art. 1-003, items 27 and 28 of the Electoral Code. 16 L.P.R.A. § 2003(27)(28)."

The Legislature, by virtue of the general repealing clause in art. 10-016 of the Code, repealed the provisions of the former election law, and consequently, the sections regarding the method by which the parties nominated and chose the order of the candidates at-large disappeared. Likewise and as a result of said clause sui generis, sec. 63 which contained several important provisions regarding the manner and method by which a voter cast his vote in a split ballot, was repealed.

[2] It is an elemental rule that when a law is repealed it ceases to exist.[4] In the legislative debates which preceded the adoption of the Code there is no indication whatsoever of an express rejection of the aforementioned rules. What it implies is that since the Code became effective until the rules under our consideration were promulgated, there existed a statutory and regulatory vacuum regarding the intervention of the political parties as to the order of printing in which the candidates at-large would

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[4] Article 6 of the Civil Code (31 L.P.R.A. § 6) defines the two manners of repealing a law: expressly or impliedly.

appear in the ballot and as to the additional manners by which a voter could cast his vote, it does not imply a repudiation. This circumstance is meaningful in the determination of whether the Electoral Tribunal had authority to adopt them. In order to formulate a rational and logical answer we must examine the general and specific power of said agency.

[3] Article 2-007(L) (16 L.P.R.A. § 2027) confers ample power to approve "all those rules and regulations which may be necessary for the discharge of its responsibilities and to cover what is not expressly provided [. . . by this] Code, . . . which is concomitant with the purposes thereof." In fine, it also sets as a ruling norm of construction, that the ". . . cases not foreseen in the law or in the regulations thereof, . . . [shall be resolved] . . . in equity taking into account the natural reason in accordance with the general principles of law and the established general practices and mores." (Italics ours.)

The clear and simple wording of this provision, in its literal as well as in its spiritual sense, leaves no doubt as to its scope. The power conferred to the Electoral Tribunal is all-embracing, subject only to adopt rules where the following factors concur: a) that they be necessary; b) that they be not in conflict with any express statutory provision; c) that they seek to cover gaps or areas that are not expressly included in the law; and d) that the regulations be based on the concept of equity, applied in accordance with the basic principles of law and the established general practices and mores.

Without strictly limiting ourselves to the afore-stated order, let us face the factors set forth, with the situation raised before us.

The wording of the Electoral Code, in its arts. 7-008 and 7-062 (16 L.P.R.A. §§ 2338 and 2392), is similar to the former law, insofar as it concerns the existence of only one electoral ballot and the basic method by which an elector casts his vote. Nevertheless, it establishes provisions which confer upon the respondent tribunal the power to approve the design and contents of said ballot, empowering it to approve also, through regulations, any other method of voting. It contrasts notably with the failure to mention details regarding the printing of the ballot and with the manners in which a voter shall indicate in said ballot the candidates of his choice, and the alternate manners of casting a vote by split ballot as provided by the former law (16 L.P.R.A. §§ 143 and 220).

A legislative pattern to which we cannot attribute accidental characteristics is clearly suggested: it rather presents traits indicative of the preconceived juridical design of delegating to the Electoral Tribunal the drafting of innumerable rules, minute steps and details that by their nature are susceptible of being dynamically adopted and implemented by the primary administrative body in charge of giving effectiveness to the Law.

[4] The remaining factors are present. We harbor no doubts to the effect that the rules challenged by plaintiff are not only essential and vital for the attainment of the electoral objectives, constitutional as well as statutory, but that they are in harmony with the basic axioms which nourish the concept of equity, particularly with the established practices and mores which for decades have effectively ruled previous elections.

The definitions of the Code of what constitutes a straight and a split ballot, and the statement that both exclude the candidates at-large does not militate against the above conclusion. Upon defining the straight ballot as that "one on which all the

candidates of only one party are voted for except candidates at-large," the lawmaker is simply acknowledging that the adjudication of a vote thus cast, covers all the candidates proposed by the party in question, with the exception of the candidates at-large, since, by operation of law, the latter appear in the only electoral ballot available. The exception answers to two cognizable legitimate interests: first, to preserve to the maximum the right and free will of a voter of being able to choose an at-large candidate irrespectively of the order in which they appear in the column of his party; and second, to protect such vote from the confusion and nullity which would entail the definition to the effect that a straight vote represents ". . . all the candidates of only one party . . ." including the candidates at-large, inasmuch as it would mean the perpetuation of the absurdity of vitiating a priori such will since it would constitute a null vote cast for more than one candidate for the same office in contravention of the provisions of Sec. 3, Art. III of the Constitution. The definition of a split ballot as that "one on which any combination of candidates from independent or different political parties are voted for, individually or for elective offices, or by writing in the name of the candidate when not appearing on the ballot, except candidates at-large," parts from a similar premise. These definitions do not conflict at all with the regulations approved by the respondent Tribunal, which fully meet the necessary requirements as previously outlined.

III

As additional grounds in support of his allegation of unconstitutionality, petitioner states:

"The Puerto Rican democracy has been maturing progressively through the years. The independent vote has increased

geometrically in recent years, as follows: 1960--0.38%; 1964--1.26%; 1968--4.72%; 1972--8.4%. A survey this year places it in 14.4%. El Nuevo Día, September 13, 1975, p. 5.

"Democracy in itself, and particularly, the United States democracy, advances towards the protection of independent candidates and voters, liberating the people from the restrictive influence and control of political parties. The vote for candidates is another version of the right of freedom of expression. To insist on permitting the parties to choose the order in which its at-large candidates should appear in each electoral precinct would be to curtail the right of the Puerto Rican voter to the freedom of expression.

"The vote for candidates is, besides, a version of the freedom of association. Cf. Kusper v. Pontikes, 38 L.Ed.2d 260 (1973). To permit the noxious practice pointed out would constitute a violation of that right.

"To permit the parties to choose the order in which its candidates at-large should appear in each electoral precinct violates the equal protection of the laws, inasmuch as it makes the vote of an independent voter to have less weight, and to be less effective, than that of the voter who votes only one cross for a party in that precinct.

"Finally, said practice violates the constitutional right to the equal, direct, and secret vote. Williams v. Rhodes, supra. In this case, the 'direct' vote of the elector is weakened since he is not the one

> who actually selects his candidate at-large, but the party, by placing him in the first place on the ballot used in his precinct. The vote of the voter, in this case, did not 'serve its purpose.' Cf. Fortson v. Morris, 385 U.S. 231 (1966), at p. 250 (Fortas, dissenting); Kirby, 'The Right to Vote,' in The Rights of Americans, Vintage Books, N. Y., 1972."

[5] The constitutional provisions regarding the right to freedom of expression, of assembly, of universal, equal, direct, and secret vote, and of the equal protection of the laws, are not violated by the regulations challenged.

First, the rule which empowers the political parties to choose the order in which the candidates at-large should appear and the one which provides that the straight ticket vote be adjudicated as a vote for the first of such candidates, was issued with other rules which empower the voters to depart from said order and to vote for another candidate to the office, not only of his own party, but of any other party, or for an independent candidate.[5]

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[5] These Rules are:

> "a. Straight ticket in favor of a party: If he wishes to vote the straight ticket in favor of only one party, the voter shall make a cross or draw a line of any dimension and form above or below the emblem of the party, or in any space in the column corresponding to said party except in the spaces which are at the right or left of the names of the candidates. Voting in this manner, the vote shall be counted for all the candidates whose names appear in the column of the said party.

Second, without curtailing the value that the independent vote represents in a dynamic democratic society, we cannot attribute a state of unconsciousness to the elector who votes a straight ballot and consequently gives his vote to the first of the candidates at-large of his party. The preference for the straight ticket may be due to several reasons: there will be voters who wish to endorse fully the candidates presented by his party without judging them

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"b. Vote for candidates: If the voter wishes to vote for candidates, and not the straight ticket of a political party, the voter shall put a cross or draw a line in the space at the right or left of the column of each party. Voting in this manner the vote shall be counted only for each of the candidates in whose space such mark appears. For the purposes of the count this ballot shall be considered as a split ballot.

"c. The voter may also cast his vote in the following manner: Drawing a cross or line of any dimension or form above or below the emblem in the column of a given political party, and also by marking, individually, a cross or line in the space at the right or left of the name of one or more of the candidates of the other political parties for any of the offices to be voted for. In such a case it shall be understood that the voter voted for the candidates thus individually marked and for the candidates for the remaining offices appearing in the column of the party where he made a cross or line. For the purposes of the count this ballot will be considered as a split ballot."

adopting--without it meaning a restriction to the exercise of his free will--the decisions of the directing organizations of the political parties, because they consider that such endorsement will have in the final results, more effectiveness against the opposition, and others who will consider said method a learned decision that would warrant the election of those candidates who will support the governmental program they endorse.

In the third place, if we conceive the independent vote as one where a voter casts his vote without following the party lines, the existence of the rules under our consideration do not affect at all the advance in crescendo of the independent vote. It is a well-known fact that all the candidates of a political party, including those at-large, appear in the electoral ballot in the same vertical column. Before entering the voting booth the voter who is going to cast his vote acts by virtue of a preconceived idea or of a decision taken at the time. Under both suppositions, if he wishes to cast his vote for an independent candidate, in order to make it good, he would necessarily have to discard the candidates of his party, regardless of the order in which they appear. For said voter, the names of the candidates nominated or the order established by the political party will not constitute a determinant or relevant criterion; he is not bound to act in a specific manner nor is voluntariness detracted from his decision.[6]

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[6] The figures cited by plaintiff, indicative of the constant increase of the independent vote, corroborates this reasoning, since as we have seen, during the election periods to which said figures refer there were in effect provisions of law substantially analogous to the rules under our consideration.

The multiple choices offered by the regulations approved to a voter, defeat the contention that the rights to freedom of expression and association are curtailed. It is not correct either to assume that the equal protection of the laws is violated: the value of an independent vote and of a straight one is the same, inasmuch as its effectiveness and impact will not depend on the manner in which it is exercised, but on the total number of votes resulting once canvassed.

[6] The constitutional provision on equal, direct, and secret vote is not violated. The equality of the vote is unquestionable and there is no doubt as to its secretness. The requirement that the vote be direct does not mean, as petitioner's argument impliedly suggests, that in order for a vote to be "direct" the voter has to make a separate and individual mark on each of the names of the candidates which he chooses. The constitutional statement of direct vote reflects the method of popular election, through which all the qualified voters participate, as opposed to the method of indirect voting through delegates. Its scope was explained thus by the Constitutional Convention:

> "The election of every popularly elected official shall be by direct vote. The Committee points out that the plan, the second-grade system of election, that is to say, by indirect voting, is not fully democratic for the people actually delegate in other persons a privilege which is inherent to them, the privilege that each citizen by his own responsibility, exercising his sound discretion, chooses in the elections the person he desires for a specific office." Op. cit. at 2620-2621.

IV

[7] It remains for us to examine the main objection to the effect that the system approved for the election of candidates at-large represents a non-official reapportionment in contravention of the Constitution of Puerto Rico and that of the United States of America. Petitioner states the synthesis of the argument as follows:

> "By permitting political parties to choose in which and in how many electoral precincts shall one of its candidates at-large appear in the first place in the list and by permitting a straight ticket to count for the first one in the list, this Hon. Court would be de facto permitting the party in question, to reapportion the electoral districts to the detriment of the voters. This is even more serious when the express intent of the Constitutional Assembly was that the entire island be the electoral precinct of the candidates at-large as we previously showed."

At the beginning of this opinion we indicated that traditionally and constitutionally the choice of legislators at-large was conceived as a combination of the proportional representation system and the territorial representation system, and we emphasized that the Constitutional Assembly was conscious of the prevailing system to choose them, where political parties intervened, without repudiating that system. We have also analyzed and outlined the reasons to conclude that the method used does not violate the clauses of our Constitution concerning several basic rights contained in its Bill of Rights. That would suffice to dispose of this contention; however, we deem proper the clarification of several particulars.

The mandate on reapportionment of electoral districts as a means to give effectiveness to the equality of the right to vote of each citizen, took form in Sec. 4 of Art. III of our Constitution a decade before the Federal Supreme Court decided to submit the judicial vote to plans of reapportionment of electoral districts by virtue of the leading case of Baker v. Carr, 369 U.S. 186 (1962). Said pronouncement started what the scholars have characterized as "reapportionment revolution." In essence, the aforesaid doctrine advocates the principle that the vote of a person has identical value to that of another, and that therefore the electoral districts should be constituted in terms of substantially equal population.

To that effect, our Constitution provided the decennial creation of a Board, composed by the Chief Justice of this Court and by two additional members appointed by the Governor with the advice and consent of the Senate, the commission of which is to examine the senatorial and representative electoral districts and fix the new geographical limits necessary to attain the most substantial population equality, taking as a basis the federal census and the standards of contiguity, compactness, and means of communication.

The duties of the Constitutional Board deal with the territorial division of the Island in its eight (8) senatorial and forty (40) representative districts. Its ambit circumscribes to the revision of the fixed electoral districts from which the candidates which regularly compose both legislative bodies are elected; it does not consider, because it is unnecessary, the standards regarding the candidates at-large, the election of which embraces and is decided by counting the votes of all the voters in Puerto Rico. Once the corresponding electoral division is

established by the Constitutional Board,[7] the political parties and the electoral regulations must follow it with regard to the election of the candidates of the regular districts for the Senate and the House.

The standard adopted by the Electoral Tribunal which empowers the political parties to choose the electoral precinct and the order of its respective candidates at-large together with the standard that adjudicates the straight vote to the first of said candidates, does not annul or contradict the duties of the Constitutional Board. The standards which originate from the regulations adopted by the Electoral Tribunal and those of the Constitutional Board, develop in two different spheres of action and are not inconsistent between them. The ambit of the first cover the election of candidates at-large and the ambit of the Constitutional Board cover the candidates of the regular districts. Whether it be by straight ballot or by split ballot, the scope of a vote shall not depend on the order of the ballot, but on the final decision of the voter for which valid alternatives are established: where it concerns the fixed senators and representatives, its value is adjudicated only for such purposes; where it concerns the candidates at-large the vote transcends the limits of the electoral district in question and is computed taking into consideration the other votes cast throughout the Island.

Finally, it is important to emphasize that the Puerto Rican system of electing candidates at-large has no precedent in the

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[7] Under the constitutional mandate, the first revision and division was adopted on April 23, 1964, and the second on April 3, 1972.

United States jurisdiction.[8] The cases and authorities cited by petitioner unfold in a background of different facts and

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[8] Robert B. McKay, a recognized jurist in the field of electoral reapportionment, expert on our electoral system, and former dean of the School of Law of the New York University, expressed himself on this matter in the following terms:

> "The method of choosing the Senators and Representatives at Large in the Puerto Rico Legislature apparently has no counterpart in mainland United States, and there are accordingly no direct precedents. However, on the basis of analogy and logic the procedures appear to be defensible and constitutionally valid. The only possible problem arises from the fact that there is no residency requirement for any candidate for Senator or Representative at-Large. Thus, it is at least theoretically possible for all at-large candidates to come from a single election district. However unfortunate (and unlikely) that result might be in fact, the practice does not appear to be invalid. There is no federal constitutional requirement that a candidate for elective office live within a specific district which he seeks to represent, much less a requirement that at-large candidates be somehow chosen on a geographical basis. Cf. Whitcomb v. Chavis, 402 U.S. (1971); Dusch v. Davis, 387 U.S. 112 (1967)." (Italics ours.) Publication of the Dossier of the "Determinación Final de la Segunda Junta Constitucional de Revisión de Distritos Electorales, Senatoriales y Representativos y Documentos Relacionados." Pp. 78-79.

therefore are not applicable in our juridical environment. Our Constitution acknowledges the existence of political parties as groups of opinion empowered to propose the candidates of their choice; corollaries of the right to vote and consubstantial with the very existence of our political democracy. Dávila v. Sec. of State, 83 P.R.R. 180 (1960). The fact that the law authorizes the political parties--in view of their pre-election estimates, strategy or for other reasons--to choose the precincts which are more convenient to put a specific candidate at-large in first place, does not reduce or weaken the electors' vote, and as we have seen, it does not affect either per se the election of independent candidates.

The Constitutional Convention stated quite accurately the main justifying objective of the method:

> "The democratic process at its most effective stage makes it advisable that all the geographical sectors of the country be represented in its legislative body. This principle is not inconsistent with the convenience that the political parties sit in the Legislative Houses the most outstanding leaders and the principal exponents of their programs. Both things are attained keeping the organization of senatorial and representative districts and choosing a large number of senators and representatives at large." 4 Diario de la Convención Constituyente 2591. (Italics ours.)

In view of the foregoing, considering the respect[9] due to

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[9] In N.P.P. v. Electoral Tribunal, decided on March 31, 1976, 104 P.R.R. ___, we emphasized the ample constitutional power of the Legislature in matters of electoral nature as was shaped in Sec. 4 of Art. VI of the Constitution.

the contentions of the Constitutional Assembly regarding the election of the candidates at-large with the active participation of the political parties, and the legitimate and prevailing interest which it represents in our democratic system of government--without violating any constitutional provision--we hold that the regulations approved by the Electoral Tribunal on June 17, 1976 are valid and constitutional.

Judgment will be rendered to that effect.

Mr. Chief Justice Trías Monge and Mr. Justice Martín concur in the result without an opinion. Mr. Justice Rigau will issue a concurring vote.

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

Juan M. García Passalacqua,

Petitioner — Review

v. — No. O-76-302

Electoral Tribunal,

Respondent

MR. JUSTICE RIGAU, concurring.

San Juan, Puerto Rico, August 31, 1976

I am writing these words because I think that it is useful to discuss and, if possible, to clarify some arguments raised in this case.

It is useful to do so, in my opinion, to propitiate a better understanding of the problems argued in the case, such as why are elections held?, how can the voters make effective their will to back a political program and elect a group of leaders to form a government?, and others which I will mention later on.

Let us begin by clarifying the concept of "independent" vote. Every vote in Puerto Rico is independent. Here the vote is free and secret. Every voter enters into an individual voting booth alone with a printed ballot and a pencil. He votes secretly and nobody, except him, knows with complete certainty how he voted. There is hardly a more secret act carried out by a voter in Puerto Rico.

In order to be fair, and for a better understanding of the following, it is proper to clarify that petitioner uses the term

"independent vote" when he refers to the vote cast by a minority of voters in every election, which is a vote outside party lines, a personal, individual vote.

Petitioner affirms that Puerto Rican democracy has matured through the years and argues that that maturity is evident by the use of the vote outside party lines. The reality is that the electorate shows its maturity when it is able to choose for its country between one political destiny and another, when it is able to elect and reelect the governments which serve it well and when it is able to remove governments which do a poor service for the people. The equation ruling that the greater the number of votes outside party lines the greater the maturity of an electorate, is not necessarily correct. That may be possibly correct in some very special circumstance but, in the majority of cases, the vote outside party lines represents a bad symptom in a country's political system. This requires explanation and I shall do so hereinafter. Now we will go into the essence of the question.

It is easy to understand that contemporary democracy cannot operate in a direct manner, whereby each one of us would vote in an assembly on each legislative measure and on every administrative action in particular. That was possible in the city-states of classical Greece and in the New England town meeting. That is no longer possible in today's cities and states due to their size, their enormous population and the great number and complexity of their problems. That is why modern democracy has to be representative.

The mere size of modern democracies has forced them to be representative and political parties to be the vehicles of the electoral will and consequently, of democracy itself. In the preelection campaign two or more groups of men offer a political and administrative program to the country. Around the said groups there is already a political party, or one is organized if there is none. The parties

adopt the programs conceived by their leaders. That has to be necessarily so since hundreds of thousands of voters, in the case of Puerto Rico, cannot meet in an assembly to discuss and draft a political program. This is generally done by a committee or an assembly which may consist of a half dozen or a hundred men. Of course, there are means of obtaining the electorate's points of view on particular problems and this is achieved sometimes. But the fundamental function of the leaders is to educate and direct, not merely to follow the masses.

The party that wins the election comes to power with a program and an electoral mandate. The system is rational and, although with disparate efficacy, it works.

On the contrary, the vote outside party lines cannot offer the country a government program simply, because it lacks one. The vote outside party lines is frequently a valetudinarian vote. It is a manner of protesting but not of organizing governments. It weakens the political parties since it tends to aggravate internal conflicts, to perpetuate the differences of opinion and to divide the parties into factions. It impairs the democratic process in general and particularly, it obstructs the democratic function of electing and forming governments.

In connection with the foregoing, Professor Binkley has written that the greatest tribute which can be rendered to the political morality of the Americans of 1787 is to acknowledge that in spite of the bitter dispute which took place regarding the ratification of the Constitution of the United States, said dispute did not leave irreconcilable groups.[1] The Professor and later President Woodrow Wilson also commented on that particular.[2]

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[1] Binkley, American Political Parties 61 (2d ed. 1945).

[2] Wilson, Congressional Government 2 (1885).

Experience has shown that the proliferation of factions and parties, upon fragmenting public opinion excessively, has a disastrous effect on the democratic system. It confuses the democratic system, paralyzes it, and, finally, disreputes it. History has shown that when that situation occurs the beneficiaries of the same have been the very enemies of the democratic system. It may be recalled that the careers of Hitler and Mussolini owed a great deal to that. In France, due to the proliferation of political parties, there were 99 governments in a period of 67 years (1873-1940), each one with a life average of approximately 8 months. Fifty of those governments lasted only 6 months or less.[3]

That political instability was one of the main reasons, if not the principal reason, for France's weakness and disaster in the Second World War. On the contrary, note the strength and stability of political democracy in England and in the United States, where the national political parties are few--usually two and sometimes three--and have long lives. The two national political parties of the United States, the Democratic and the Republican, have survived more than thirty presidential elections.

Political representation, organized through political parties, is one of the fundamental aspects of modern government and of the democratic system in particular. We pointed out before how the physical conditions of size and population, and the complexity of today's public problems have made it necessary to resort to the representative system. A classic on this matter states that "modern democracy is inconceivable except in terms of political parties."[4]

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[3] Finer, The Theory and Practice of Modern Government 627 (rev. ed. 1960).

[4] Schattschneider, Party Government 1 (1942).

One of the most serious scholars of contemporary political processes considers the role of political parties in modern democracy as "indispensable".[5] Another writes: "Representative government means government through parties."[6] It can be said that if the Executive Power is the head and the Legislative Power is the heart, the political party is the blood which binds them, connects them, and gives them life. Without a strong and disciplined political party the task of the Executive and Legislative Powers becomes very difficult and frequently impossible or sterile. The electorate controls popular sovereignty, makes it effective through political parties, which form a government when they gain power. The government shall always bear in mind that the will of the people is the source of public power and that its power arises therefrom. What the election does is to legitimate the exercise of that power. It is clear why the function of political parties in the modern democratic system is considered fundamental.

The foregoing does not mean, of course, that the most important thing is the interest of the party and that every other interest should be subordinated to the former. Every serious politician and ruler knows that the general interest of the country, the common welfare should be the most important thing. All the other interests hold a lower position than the common welfare. What the foregoing recognizes is the practical and historical reality to the effect that a healthy democracy operates through political parties and not through votes outside party lines, without a program, without leaders, and without a course. This is not only a historical reality but it is a fundamental question, since the matter goes to the care of political

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[5] Friedrich, Constitutional Government and Democracy 430 (4th ed. 1968).

[6] Finer, op. cit. at 237.

responsibility, of the moral substance of every government. At the end of its mandate the electorate may call to account a political party which has been taken to power and reelect it or not; it cannot do the same with a conglomerate of votes, outside party lines, each one motivated by different and personal reasons.

In addition, the function of the leader or the leaders in every party is practically indispensable. Someone must engage full time in the public problems, someone has to study them, think about them, and propose remedies and solutions. The primary function of the political leader is to make those proposals, to let them reach the conscience of the citizens and to convince the voters of their advantages. If he achieves that, then the electoral body will confer him the legitimate authority he needs to carry out his program of government.

A high number of votes outside party lines may create an amorphous electoral body, a headless mass. What the masses have are more than enough mass men; what the masses need are leaders who can educate them and point out to them the most reasonable and desirable courses. As Ortega points out in one of the most penetrating books of the 20th Century, the masses do not act by themselves; they need to refer their life to the superior instance consituted by their first-rate men.[7] It is important to clarify that by expressing himself thus, Ortega was not differentiating between social classes, but between types of men.

The Petition emphasizes that the vote outside party lines and the vote for candidates constitutes the right to free expression. There is no doubt that that constitutes part of the expression of the

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[7] Ortega y Gasset, La Rebelión de las Masas 185 et seq. (5th ed. 1935).

voter, as in any other thing he may do, either lawful or unlawful, prudent or imprudent, of good or of bad taste. But the reality is that the right to free expression is guaranteed in Puerto Rico by Sec. 4 of Art. II of our Constitution and by the First Amendment of the Constitution of the United States.

The Puerto Rico electoral process is organized by our laws, in particular by the Electoral Code, Act No. 1 of February 13, 1974; 16 L.P.R.A. § 2001 et seq., and is based on the provisions of our Constitution regarding that matter.

The following constitutional provisions are relevant to that effect: the Preamble, which states that we orga ize ourselves politically on a fully democratic basis and that we understand that the democratic system is one in which the will of the people is the source of public power; Sec. 1 of Art. I of the Constitution, which states that the political power of the State emanates from the people and shall be exercised in accordance with their will; Sec. 2 of Art. II which provides that the laws shall guarantee the expression of the will of the people by means of universal suffrage; Art. III which provides for the election of the members of the Legislative Assembly; Art. IV which provides for the election of the Governor; Sec. 4 of Art. VI which provides that general elections shall be held every four years; Art. VIII which deals with the senatorial and representative districts and Sec. 6 of Art IX which deals with political parties.

So it is not necessary to resort to the electoral provisions of our Constitution and of our laws in order to invoke or defend the right to free expression since said right is, as we pointed out, expressly guaranteed by Art. II of our Constitution and by the First Amendment of the Constitution of the United States. Our electoral system is organized by the electoral provisions of our Constitution as well as of our laws. In other words, nations do not incur

the enormous expense and the collective trauma of holding elections to merely guarantee free expression; elections are held to elect governments. The right to free expression, essential as it is, is guaranteed by the two aforementioned constitutional provisions.

Of course, the elector's right to vote outside party lines or to vote for candidates if he thus desires, must exist. But that right, the exercise of which constitutes an abnormality in the electoral process and which frequently represents a symptom of poor health in the political body, must be recognized as what it is, but we believe that it should not be exalted to the category of political virtue.

TL/is

IN THE SUPREME COURT OF PUERTO RICO

Fuentes

Jaime B. Fuster et al.,

Plaintiffs-appellees

v.

Walter Busó et al. and Puerto Rican Independence Party,

Defendants-appellants.

Appeal from the Superior Court, San Juan Part.

No. O-73-469

Mandamus

San Juan, Puerto Rico, May 31, 1974.

PER CURIAM: It is controvertible whether plaintiffs have the standing to bring this action. They are three citizens and two imaginary persons: "Fulano de Tal" and "John Doe." Fulano de Tal is the Spanish version of John Doe in the English language.

We say that plaintiffs' standing is controvertible because the nominal purpose of this action is to seat Roberto Sánchez Vilella in the House of Representatives of Puerto Rico, but Sánchez Vilella who would be the person really interested is not the plaintiff nor is a party in the litigation. However, because of the public interest of the matter and inasmuch as several constitutional provisions, a provision of the Election Law, and an action of the Commonwealth Board of Elections are involved in this action, we have decided to consider the case on the merits.

[1] This is not a case of gerrymandering, a practice which implies meanness of spirit in the political dispute[1]; nor of its

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[1] In the political literature of the United States gerrymandering is the practice of designating or demarcating one or more election districts for the premeditated purpose of favoring a specific political party. That name was popularly given because of the fact that Governor Elbridge Gerry, of Massachusetts, was the

corrective, the rule of one man one vote.[2]

In Baker v. Carr they challenged a 1901 Tennessee electoral statute which proved to be unjust in 1961, on account of the changes which had taken place during the course of 60 years in the size and location of the population of that state. See 369 U.S. at , 192. Ten years before Baker v. Carr the Constitution of Puerto Rico, in 1952, provided that in this country the division of senatorial and representative districts made for the purpose of election of the members of the Legislative Assembly would be revised after each decennial census beginning with the year 1960, and it also provided that said districts "shall be composed of contiguous and compact territory and shall be organized, insofar as practicable, upon the basis of population and means of communication." Constitution of Puerto Rico, Art. III, Sec. 4. L.P.R.A., vol at p. 228, 1965 ed. In the case at bar no question whatsoever is raised as to the validity of said division of senatorial and representative districts.

This case does not deal either with electoral machinations motivated by racial prejudice.

Let us see what this case is really about. The Popular Democratic Party was created in 1938. Five parties participated in

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one who in 1811 signed a law to that effect. Some authors believe that such notoriety towards Gerry is unfair since he opposed said practice. Gerry was one of the signers of the Declaration of Independence of the United States and he was later Vice-President of that country. Safire, The New Language of Politics (1968); Smith and Zurcher, A Dictionary of American Politics (1946).

[2] Baker v. Carr, 369 U.S. 186 (1962); Gray v. Sanders, 372 U.S. 368 (1963).

the 1940 election, but of those only three had enough electoral force to have a real probability of winning that election.[3] The Popular Democratic Party received 38 per cent of the total votes cast. In the following election, in 1944, it received 64 per cent of the votes. In the 1948 election it received 61 per cent and in 1952, 65 per cent. In the 1948 election the Popular Party won in all the 78 municipalities of the island.

As to the composition of the Legislative Assembly, the following was the result of those electoral victories of the Popular Party. In the quadrennium from 1944 to 1948, 17 of the 19 senators belonged to said party and two to the opposition, and in the House of Representatives the party of the majority obtained 37 seats and the opposition obtained only two. In the quadrennium from 1948 to 1952 the situation in the Senate was identical with the aforementioned one and in the House of Representatives the Popular Party obtained 38 seats and the opposition obtained only one.

The top leadership of the Popular Party, presided by Luis Muñoz Marín, was concerned by this situation of scarce representation of the minority parties in the country's Legislative Assembly. Said leadership was convinced that it was necessary to guarantee a substantial representation to the minority parties in the Legislative Assembly even if their candidates did not receive in the election the votes necessary to be elected.

The same idea prevailed among the aforementioned political leaders at the time of drafting and approving the act which authorized the election of the delegates to the Constitutional Con-

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[3] Said five parties and the number of votes they received in the 1940 election were the following: Popular Democratic 214,857; Republican Union 134,582; Puerto Rican Unification 130,299; Socialist Party 87,841, and Pure Agricultural 1,272.

vention of Puerto Rico, convention which would subsequently approve the Constitution of Puerto Rico. For that reason said act, Act No. 1 of July 3, 1951, expressly provided as follows:

> "The Constituent Convention shall be composed of not more than ninety-five (95) delegates who shall be elected as follows: Not more than twenty-three (23) delegates at large, of whom no political party may nominate or elect more than fourteen (14) delegates; and nine (9) delegates in representation of each of the eight (8) districts listed in the preceding paragraph, and no political party may nominate or elect more than seven (7) delegates in each of said districts." -1951 Sess. Laws of Puerto Rico, p. 8. (Italics ours.)

In effect, in the special election held on August 27, 1951 to elect the delegates to the Constitutional Convention, 92 delegates were elected and 70 of those were elected by the Popular Party, 15 by the Statehood Party, and 7 by the Socialist Party.[4]

As a result of the aforementioned concern of the leaders of the majority party with regard to the scarce representation of the minority parties in the Legislative Assembly, the Popular Democratic majority in the Constitutional Convention proposed, and was accepted

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[4] Of those 92 delegates 32 were attorneys, 13 farmers, 9 labor leaders, 6 teachers, 6 businessmen, 5 industrialists, 4 physicians, 3 journalists 2 judges, one banker, one dentist, one engineer, one pharmacist, and one bookkeeper. -Office of the Resident Commissioner of Puerto Rico in Washington, Notes and Comments on the Constitution of the Commonwealth of Puerto Rico 25 (1952).

the idea of including in the Constitution measures to guarantee the representation of the minority in the Legislative Assembly of Puerto Rico, even though the candidates of the minority parties did not obtain the votes to be elected.

[2] We have already mentioned Sec. 4 of Art. III of the Constitution of Puerto Rico, which orders the revision every ten years of the division of the island into senatorial and representative districts, on the basis of the decennial census and said provision orders also that said districts shall be composed of contiguous and compact territory organized upon the basis of population and means of communication. It can be said that said sec. 4 incorporated into our Constitution the rule of one man one vote.

The specific provisions guaranteeing the representation of the minority parties in the Legislative Assembly are in Sec. 7 of said Art. III of the Constitution. Said section provides, in essence, that when in a general election more than two thirds of the members of either House are elected from one political party, the number of members of the body in question [Senate or House] shall be increased by declaring elected a sufficient number of candidates of the minority party or parties to bring the total number of members of the minority party or parties to nine in the Senate and to 17 in the House of Representatives.[5]

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[5] The following are other examples of the action taken in the Constitution and in the Laws of Puerto Rico under the Government of Governor Muñoz Marín and the Popular Party, through which very important powers were taken away from the Governor, powers which said officer used to have under the Organic Act of 1917 and under the previous laws: (1) Martial Law: Under the Organic Act the Governor could decree the Martial Law. Under the Constitution of Puerto Rico if the Governor decrees the Martial Law the Legislative Assembly shall meet forthwith on its own initiative to

Said section 7 provides also that in order to select the additional candidates from a minority party under the circumstances implied by this section, its candidates at large who have not been elected shall be the first to be declared elected in the order of the votes that they have obtained, and thereafter its district candidates who have not been elected either.

Said sec. 7 provides also that the Legislative Assembly shall determine the minimum number of votes that a minority party must cast in order to have the right to the additional representation provided by said sec. 7.

The Constitution provides that the Legislative Assembly would fix the minimum number of votes that a minority party should cast in order to participate of those seats not conquered in the ballots but granted by the Constitution, pursuant to the aforecited

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ratify or revoke the action of the Governor. (2) Habeas Corpus: Under the Organic Act the Governor could suspend the writ of Habeas Corpus. Under the Constitution that can only be done by the Legislative Assembly, in cases of rebellion, insurrection or invasion. (3) Judicial Power: Article V of the Constitution created an independent Judicature. Under the Organic Act the Administration of the Courts was in the hands of the Executive Branch (Department of Justice). Now it is the function of the Chief Justice of the Supreme Court of Puerto Rico. The Judiciary Act and the Retirement Act of the judges give the judges full freedom to comply with their duties. The number of justices of the Supreme Court can only be changed by a proposal of the Court itself. (4) Elections: Formerly when an agreement was not reached in the Board of Elections, appeal was taken to the Governor. The law was amended to take the appeal to the Chief Justice. Under the previous law, for the elections, the Governor appointed his representatives in different towns. The law was amended in order that the Supervisor of Elections would appoint his own representatives.

Sec.7 of Art. III because, as it clearly appears from the Diario de Sesiones de la Convención Constituyente de Puerto Rico the constituents sought to discourage the development of many small political parties and rejected, the proportional representation because they thought it was undesirable. See, for example, the discussion between delegate Parkhurst and delegate Gutierrez Franqui in 3 Diario de Sesiones de la Convención Constituyente de Puerto Rico 2025-2056, Equity Ed. 1961.

Pursuant to this constitutional mandate by which the Legislative Assembly was to fix the aforementioned minimum number of votes, said body approved and the Governor signed Act No. 18 of August 22, 1952, (16 L.P.R.A. § 276) which added sec. 89(a) to the Election Law then in force. The last two paragraphs of said sec. 89(a provide the following:

> "No minority party shall be entitled to additional candidates nor to the benefits provided by this section unless it shall obtain for its candidate for Governor in the general election a number of votes equivalent to five (5) per cent or more of the total number of votes cast in the said general election for all the candidates for Governor voted for in said election.
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> "The minority parties shall, under the provisions of this section, never have among them more than 9 senators nor more than 17 representatives." 1952 Sess. Laws of Puerto Rico, p. 204. (Italics ours.)

The Constitution of Puerto Rico became effective on July 25, 1952, after a process whose immediate commencement was the introduction by Puerto Rican initiative, in the United States Congress

in March 1950 of a bill that later became Public Law 600, approved on July 3, 1950, 64 Stat. 319. A summary of said constitutional process may be seen at 98 P.R.R. 428-431.

In 1964, after having been elected four consecutive times Governor of Puerto Rico, Luis Muñoz Marín refused to be nominated for a fifth term. He explained that it was not good for the Puerto Rican democracy that he be elected for a fifth term.

As a result of the 1964 election, where the Popular Democratic Party won, Sánchez Vilella was elected Governor. During the course of the next two years Sánchez Vilella broke with his party, subsequently entered the People's Party and participated in the Election of November 1968 as candidate for Governor of said Party. The People's Party had been registered in January 1968. In that election the New Progressive Party won and Luis A. Ferré was elected Governor. Luis Negrón López, candidate for Governor of the Popular Party obtained the second place, and Sánchez Vilella obtained the third place as candidate for the People's Party.

In the general election of 1972 the Popular Democratic Party won again, the New Progressive Party obtained the second place, the Puerto Rican Independence Party the third place, and the People's Party the fourth place. For the 1972 election Sánchez Vilella was not nominated for Governor, but for Representative at Large for the People's Party.

Pursuant to our Constitution, in Puerto Rico the Legislative Power is exercised by a Legislative Assembly composed by two Houses--the Senate and the House of Representatives. The Senate is composed of 27 senators and the House of Representatives of 51 representatives, except when said composition is increased by virtue of the provisions of the aforecited Sec. 7, Art. III of the Constitution.

For the purposes of the election of the members of the Legislative Assembly, Puerto Rico is divided into eight senatorial districts and forty representative districts. Each senatorial district elects two senators and each representative district elects one representative. But also by a constitutional provision, eleven Senators at Large and eleven Representatives at large are elected. None of the voters shall vote for more than one candidate for Senator at large nor for more than one candidate for Representative at large. Art. III, Constitution of Puerto Rico.

The election of eleven Senators at large and of eleven Representatives at large gives the minority parties the opportunity to be represented in the Legislative Assembly even though, as a result of their scarce electoral force, they do not succeed in electing any representative in the respective districts.

As a result of the 1972 election the Popular Democratic Party elected 37 Representatives to the House (a number higher than the two thirds of the members of that House: Sec. 2, Art. III of the Constitution) and the New Progressive Party elected 14. The situation suggested by subdivision (a) of Sec. 7, Art. III of the Constitution, by which the number of Representatives to the House may be increased to grant additional representation to the minority parties arose, after the Popular Democratic Party obtained less than two thirds of the total votes cast by all the parties for the office of Governor.

The following two provisions, one constitutional and the other statutory, are also of cardinal importance to understand and solve this litigation: The aforementioned Sec. 7 of Art. III of the Constitution, which provides in its last paragraph that the Legislative Assembly shall determine the minimum number of votes that a minority party must cast in favor of its candidate for Governor in order to have the right to the additional representation established by said sec. 7.

The second provision is the aforecited sec. 89(a) of the Election Law then in force, 16 L.P.R.A. § 276, which, as we have set forth, was incorporated to the Election Law by Act No. 18 of August 22, 1952. Said provision provides that no minority party shall be entitled to additional candidates unless it shall obtain for its candidate for Governor in the general election, a number of votes equivalent to five per cent or more of the total number of votes cast for all the candidates for that office.

Said section provides also that by virtue of its provisions the minority parties shall never have among all of them more than 9 Senators nor more than 17 Representatives. The reason for those figures is that the Act wants to prevent the anomalous result that by granting additional seats, the minorities turn out to have more than one third of the members of one or both Legislative Houses when the majority party has obtained those two thirds or more. This is thus because there are matters which require two thirds or more of the votes and otherwise the additional seats granted would thwart the electoral mandate.

The Commonwealth Board of Elections, public agency which administered the Election Law,[6] in compliance with the aforecited Sec.7 of Art. III of the Constitution, and of sec. 89(a) of said Law, added three seats in the House of Representatives, two of them corresponding to the Puerto Rican Independence Party and one to the new Progressive Party, both minority parties.

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[6] The former Election Law has been recently substituted by a new Election Law called Electoral Code of Puerto Rico, Act No. 1 of February 13, 1974.

To said effects the Commonwealth Board of Elections determined that David Urbina, for the New Progressive Party, and Carlos Gallisá and Luis Angel Torres for the Puerto Rican Independence Party should be declared elected, and they were thus declared.

Sánchez Vilella, who, as we have said before, was nominated for Representative at Large for the People's Party, a party which in the 1972 election obtained less than one third of one per cent of the votes cast, was not elected to any position whatsoever.

In March 1973 plaintiffs filed a petition for mandamus requesting the Court to order the Commonwealth Board of Elections to certify Roberto Sánchez Vilella as a candidate elected for the position of representative at large. Plaintiffs basically grounded their position on the fact that Sánchez Vilella received 59,855 votes (from a total of 1,308,950 votes cast)[7] while Urbina, Gallisá and Torres had obtained considerably less votes than Sánchez Vilella. After some procedural steps which we need not set forth here, petitioners obtained from the Superior Court a declaratory judgment favorable to them.

The defendants-appellants, members of the Commonwealth Board of Elections, assign six errors on appeal, but it is not necessary to mention them all because we understand that in order to dispose of this case it suffices to mention errors Nos. 2, 3, 4, and 6, which were committed and the commission of which entails the reversal of the judgment appealed from.

Assignment No. 2 is to the effect that the trial court erred in deciding that there is an unreconcilable conflict between secs. 2 and 7 of Art. II and Sec. 4 of Art. VI, on the one hand, and sec. 7 of Art. III, on the other, all of them of the Constitution of Puerto Rico.

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[7] Sánchez Vilella obtained more votes than his own party, the People's Party.

The third assignment is to the effect that the trial court erroneously applied to this case the doctrine of "one man one vote."

The fourth assignment is to the effect that the trial court erred in deciding that the Commonwealth Board of Elections should have dispensed with sec. 89(a) of the Election Law.

The sixth assignment is to the effect that the trial court erred in failing to apply in this case Sec. 7 of Art. III of the Constitution and sec. 89(a) of the Election Law.

We are going to refer to the second assignment. It alleges that the court erred in holding that several sections of Art. II and of Art. VI of the Constitution are incompatible with sec. 7 of Art. III of that same document. Constitutions are made following hard efforts and are carefully drafted.[8] It cannot be slightly assumed that contradictions are incurred therein and much less of such an important nature as the one here involved. We are dealing here with nothing less than the election process, process throughwhic governments are elected. Constitutions are not self destructive. Billings v. United States, 232 U.S. 261, 282 (1914). Except that the language makes it unavoidable, it should not be assumed that a clause of the Constitution has no sense whatsoever or that it defeats the purpose of another clause of the same document.

It suffices to examine the aforecited clauses to see that the unreconcilable conflict alleged by the trial court does not exist in them. Section 2 of Art. II, provides, in synthesis,

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[8] The Constitutional Convention of Puerto Rico which approved our Constitution and their advisers worked since the beginning of September 1951 to February 6, 1952. See Gutiérrez Franqui and Wells, "The Commonwealth Constitution"; Carl J. Friedrich, "The

that the laws shall guarantee the expression of the will of the people by means of equal, direct and secret universal suffrage and shall protect the citizen against any coercion in the exercise of his electoral rights. Section 7 of that same article recognizes the human being's right to life, liberty, and to the enjoyment of property. It guarantees the due process of law and the equal protection of the laws. It forbids the approval of laws which impair contractual obligations. Section 4 of Art. VI, orders, insofar as pertinent, that general elections shall be held every four years. It provides that in said elections there shall be elected a Governor, the members of the Legislative Assembly, and the other officials whose election on that date is provided for by law. It provides that nobody shall be deprived of the right to vote because he does not know how to read or write or does not own property. It authorizes the Legislative Assembly to legislate on all matters concerning the electoral process and the political parties. It also provides that every popularly elected official shall be elected by direct vote and any candidate who receives more votes than any other candidate for the same office shall be declared elected.

We have previously outlined the pertinent provisions of sec. 7 of Art. III, which is the section that provides for the increase in the number of Senators or Representatives when a party elects more than two thirds of the members of said Houses, for the purpose of guaranteeing representation to minority parties in the

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World Significance of the New Constitution"; Fernós, "From Colony to Commonwealth"; all these works appear in 285 The Annals of the American Academy of Political and Social Science (1953); Notes and Comments on the Constitution of the Commonwealth of Puerto Rico (1952) published by the Office of the Resident Commissioner of Puerto Rico in Washington; and La Nueva Constitución de Puerto Rico, Reports to the Constitutional Convention, prepared by the School of Public Administration of the University of Puerto Rico (1954).

Legislative Houses even though they do not elect candidates in the elections.

As it can be seen, there is nothing incompatible between any of the aforementioned clauses and articles of the Constitution. Art. II contains our Bill of Rights, Sec. 4 of Art. VI contains general provisions with regard to the elections and sec. 7 of Art. III is the vehicle used by the constituents to make a reality their desire to guarantee representation to minority parties in the Legislative Assembly. Note that said sec. 7 operates only in the extraordinary event that a party elects more than two thirds of the members of one or of both Legislative Houses. In other words, said sec. 7 does not take away anything from the electors nor from the minority parties but, on the contrary, it gives them what they would not have in its absence, this is, it grants certain legislative seats to the minority parties when the latter, all together, do not succeed in electing more than one third of the senators or of the representatives.

We are going to discuss jointly the other assignments we have mentioned since they are closely related between themselves. These are assignments Nos. 3, 4, and 6. In the first place, it is necessary to bear in mind the fact that if the People's Party had obtained in the 1972 election, in favor of its candidate for Governor, five per cent or more of the total number of votes cast in said election in favor of all the candidates for Governor which participated in said election, his party, and consequently he, would have been entitled to participate in the distribution of additional seats in the Legislative Houses, since the majority party elected more than two thirds of the members of said Houses. But the reality is that Sánchez Vilella's party--the People's Party--obtained 0.24 of one per cent of the votes. We must remember that that minimum of five per cent of the votes was provided by law by the Legisla-

tive Assembly in obedience to the aforementioned constitutional mandate set forth in the last paragraph of Sec. 7 of Art. III of the Constitution. Note also that that constitutional paragraph provides that said minimum number of votes must be cast by a minority party, not by an individual person. This is so, because the Constitutional Convention rejected the proportional representation, matter which we shall mention further on.

It is true that Sánchez Vilella obtained 59,855 votes for the office of Representative at large for the People's Party in the 1972 election. It is also true that Sánchez Vilella was not elected since in said election thirteen candidates obtained more votes than Sánchez Vilella for the office of Representative at large. From those thirteen candidates, as it is natural, the eleven which obtained more votes were elected. They were:

(1)	Luis E. Ramos Yordán	110,835 votes
(2)	Severo E. Colberg	107,777 "
(3)	Roberto Rexach Benítez	102,004 "
(4)	José R. Jarabo	101,751 "
(5)	José G. Izquierdo Stella	98,882 "
(6)	Olga Cruz Jiménez de Nigaglioni	98,732 "
(7)	Angel Viera Martínez	94,525 "
(8)	Hernán Padilla	93,740 "
(9)	Luis Ayala del Valle	89,530 "
(10)	Antonio Sagardía Sánchez	89,306 "
(11)	José Granados Navedo	87,705 "

In view of the aforementioned results of the election, the situation suggested by subsection (a) of Sec. 7 of Art. III of the Constitution, which provides for increasing the number of Representatives to the House in order to grant additional representation to the minority parties, was produced. Note that said sec. 7 as well as th

law which by mandate thereof was approved, sec. 89(a) of the Election Law, refer expressly and specifically to minority parties, for the aforementioned reason.

The aforecited sec. 7 provides also that in order to select the additional candidates of a minority party its candidates at large who were not elected shall be the first to be considered, in the order of votes they have received. So that the Commonwealth Board of Elections was bound by constitutional provision to resort first to the candidates at large of the minority parties which had obtained five per cent or more of the total votes cast for all the candidates for Governor in the election. The minority parties which qualified, then, to participate of those additional seats were the New Progressive Party and the Puerto Rican Independence Party because said two parties obtained more than five per cent of the aforementioned votes.

[3] Then, the trial court erred in holding that there was a conflict between the provisions of Secs. 2 and 7 of Art. II of the Constitution and sec. 7 of Art. III. Said provisions are perfectly reconcilable, and even more, they complement each other. They guarantee "the expression of the will of the people by means of . . . universal suffrage"--the government elected by the majority--(sec. 2, Art. II) and at the same time they guarantee the effective existence of minorities, an indispensable element in a constitutional democratic government like ours (Sec. 7 Art. III).

[4] The trial court erred also in holding that there is a conflict between sec. 7 of Art. III and Sec. of Art. VI of the Constitution. Let us explain ourselves. In the Report of the Commission on Transitory Provisions and General Matters of the Constitutional Convention the following was said with regard to sec. 4 of Art. VI:

> "For the election of a popularly elected officer an absolute majority shall not be necessary, but the candidate who, subject to the constitution or to the law, receives more votes than any other candidate for the same office shall be declared elected for an office. To declare a citizen elected to an office it shall not be necessary for that candidate to receive half of the votes plus one, of all the votes cast in favor of all the candidates for that same office in an election. It shall suffice that he receives simple majority; it shall suffice that he be elected on the basis of a majority of votes. That is to say: that the candidate who receives more votes than any other of the candidates for the same office will be declared elected; that is, the candidate who receives a higher number of votes as compared with the number of votes received by each one of the other candidates for the same office." 4 Diario de Sesiones de la Convención Constituyente 2621 (1952). (Italics ours.)

As to that particular the expressions of the then Secretary of Justice of Puerto Rico and today Chief Justice of the Supreme Court, Hon. José Trías Monge, in his opinion of January 8, 1953, directed to the Chairman of the Commonwealth Board of Elections, are correct; there he stated the following:

> "It cannot be alleged either that Act No. 18 [of August 22, 1952] is at variance with Sec. 4 of Art. VI of the Constitution of the Commonwealth to the effect that 'any candidate who receives more votes than any other candidate for the same office shall be declared elected.' This argument is in reality equivalent to the already examined argument to the effect that the intent of the Constitutional Convention was to govern the election of additional candidates through the principle of proportional representation, a principle considered and expressly rejected by the Convention. Of course, it might be strange at first sight, the fact that, as in the instant case, the requirement to the effect that the minority parties receive a given minimum of votes in order to participate in the distribution of additional candidates may operate in such a way as to allow, under certain circumstances, the election of additional candidates with less votes than others. The only manner of avoiding this discrepancy was to abstain from providing, as in the original version of the Substitute Proposal with regard to the Legislative Power, any minimum whatsoever of votes as requirement to participate in the distribution of additional candidates. To do this, however, in the opinion of the Constitutional Convention, exposed the Puerto Rican democracy to the evils of the proliferation of parties and of the artificial conservation of parties which did not have enough electoral force, with the conse-

quential division of the political responsibility before the people. The Constitutional Convention clearly deemed that it was more fundamental to prevent the latter, and Act No. 18 of August 22, 1952 is consistent with the express mandate of our Constitution in that sense.

"In view of the conclusive provisions of the last paragraph of sec. 7 of Art. III, the principle of the majority of votes cast cannot operate so as to anull the intent of the Constitutional Convention of requiring a minimum percentage of votes for the election of additional candidates. The only scope of sec. 4 of Art. VI, as it comes forth from the report of the Commission on Transitory Provisions and General Matters of January 22, 1952, was simply to reiterate the general principle of the election by majority of the votes cast instead of the principle of decision by majority of registered voters. There is no evidence in the constitutional history of this section to support the proposal that its effect is to dispense with the provisions of the Constitution itself as to the election of additional candidates." (Italics ours.)

The problem of the representation exists since the very moment that man started to think about the legitimacy of the Government and in his duty to obey the ruler. In the old times there prevailed the idea to the effect that total obedience was owed to the king because he ruled in the name of God. Soon it was evident that that theory left man in a rather precarius situation and he started to look for--and he found--theoretical outlets from that confinement. The notion of constitutionalism gained preeminence in the Middle Ages. Although, of course, the contents of that concept have been considerably developed, through the centuries, its central idea is still the same. This is, that the ruler or the government are not absolute, but that its power

has limits, it is limited.[9] A higher law is opposed to the king, it is called the natural law, which some people base on the divine law and others on human reason or on the lay natural law.

As it is known, the 16th Century was a period of incubation of the political ideas which were developed later in the 17th and 18th centuries and which later took shape in the modern constitutions. In the course of that process of taking those ideas from the political pamphlets to the constitutions, they cut the head of one of the kings of England and another of France, and we had to pass through the American revolution, the French revolution, and at least half a dozen of other revolutions in Europe in the 18th century and in the first half of the 19th century.

The extraordinary book Vindiciae Contra Tyrannos (1579) was published in said 16th century. Vindiciae assumes the existence of two pacts. In one God is one party and the king and the people constitute the other party, and another pact where the parties are the king and the people.[10]

In the first pact, the king binds himself with God to maintain the faith and in the second the king binds himself with the people to be a good and just ruler. In both contracts the power of the king is delegated or conferred; in the first one, by God and in the second, by the people. The power is granted for certain public purposes and it shall be exercised under the condition that said purposes are com-

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[9] "[I]f the King is without a bridle, that is, without law, they ought to put a bridle on him." -Bracton, 13th century. Cited in C.H. McIlwain, Constitutionalism and the Changing World, 1939, reprinted in 1969.

[10] Of course, the idea of a pact as a basis for the government is much more older than that; remember the Old Testament.

plied with. Therefore, Vindiciae explains, God and the people are the superiors, the king is a servant. In view of the second contract--the one executed between the king and its people--the resistance to tyranny is justified. The author of Vindiciae apparently takes from the Roman law the concept of the contract, which is rescinded if one of the parties fails to comply with it. If the king fails to comply with his part of the contract--to rule well--the contract terminates and it does not bind the people. Kings are really elected, maintains Vindiciae, though it has been the custom to follow the hereditary tradition. But the people's right to choose their king does not prescribe despite the long hereditary tradition. When the power is not exercised in a just and responsible manner the ruler has become a tyrant and the resistance is justified, as the author of Vindiciae admits.

The author distinguishes between two situations. One is when the tyrant is an usurper without any right to rule. In that situation his elimination, even by a private citizen, is permitted. The second situation assumes that the legitimate ruler becomes a tyrant. Then, the author maintains, only the magistrates whose position makes them guardians of the community, may resist the king. In the light of the modern American and Puerto Rican constitutional theory, which allows the declaration by the Judicial Power to the effect that certain acts of the Executive Power may be void, that statement of Vindiciae is really extraordinary. In modern times the term has changed from guardia of the community to "guardians of the constitution."

As it is known, the theory of the contract reappears in a different manner in the philosophers of the 17th and 18th centuries. --Locke, Rousseau, and others.

In the contemporary states, due to their great physical extension and to their great population, it is necessary that democracy be exercis indirectly through representatives. It is no longer possible to rule

by means of the agora of the classical Greece, or of the town meeting of the 17th century New England. Modern democracy operates by means of political parties. They present to the electorate a synthesis of government ideas and programs--what is called the platform--and also a group of men who offer to rule in consonance with those ideas and programs. Generally the electorate has two or three alternatives, and in voting it supports the one of its preference. Since it is impossible that several programs, contradictory among themselves, be carried out at the same time, it has been universally accepted that the majority will govern. The minority supervises in order to maintain the government within the morals, the law, and the constitution and waits its turn or opportunity to become a majority through the persuasion of the electorate. That system places the political responsibility on a party--the government party--and on a group of men--the one who presides the government and his most distinguished collaborators.

In this litigation plaintiffs have revived, in a certain manner, the great debate which John Stuart Mill and Walter Bagehot held in England in the 19th century. Both were economists, political theorists, liberals and colleagues, but they were in disagreement on the question of how legislative representation should be organized. Mill defended the proportional representation in a very eloquent manner. He believed that no elector should be represented by somebody whom he had not elected; that the proportional representation allowed that men of great qualities be raised to Parliament, avoiding thus what he called the "collective mediocrity"; and that that was the system which permitted the educated elite of the country to reach Parliament.

But unfortunately Mill forgot the fundamental purpose of Parliament, which is, in England to maintain the Prime Minister and his cabinet in power and <u>to govern</u> through them. Though we do not have the parliamentary system, but the presidential type, nevertheless, the Legislative Assembly participates in the governing function since it has the impor-

tant power of approving or not approving legislation and the power of approving or not approving the government budget. Though the concurrence of brilliant minds is very desirable in the Legislative Power, its purpose is not that of a club to hold debates.

Our system, as we have seen, permits and guarantees the existence of minorities and their function of supervising and criticizing the government. Bagehot pointed out that the system of proportional representation by causing an excessive division of Parliament into parties, factions, and groups, makes it practically incompetent to rule. Bagehot stated that the defects of the plan proposed by Mill surpassed greatly its virtues.[11]

La Nueva Constitución de Puerto Rico, a valuable volume which contains the Reports of the Constitutional Convention of Puerto Rico, prepared by the School of Public Administration of the Social Sciences Faculty of the University of Puerto Rico, published in 1954, contains some comments on this theme of proportional representation which give the impression to have been written for the situation which gave rise to the instant action. Insofar as pertinent, in discussing the bases for the representation the following is stated there:

> "The first argument against proportional representation consists in that it adulterates the principles of the politica representation which are the basis of the modern State. Under the democratic theory, parliament as well as each one of its members in particular, are representatives of the people, with a representation of a political character. What is represented there is an indivisible totality, contrary to the repre-

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[11] J.S. Mill, Representative Government, Chap. 7 (1860); W. Bagehot, English Constitution, Chap. 5, 2d ed. (1873); Hermes, Europe Between Democracy and Anarchy (1951); C.J. Friedrich, Constitutional Government and Democracy, Chap. 15, 4th ed. (1968).

sentation of the old medieval estates which was conceived in the manner of the private law, and where each representative or 'solicitor' talked in the name of his constituents, who could give him concrete instructions and withdraw his representation at any time. . . .

"This adulteration of the representative principle is accompanied by other inadmissible political ideas: the one to the effect that there may be irreducible divisions within the political body, and the one to the effect that the latter should have their exact reflection in the legislative body. As an effect of this erroneous conception, the system of proportional representation contributes to aggravate the internal conflicts, to perpetuate the differences of opinion, and to encourage partisan loyalties to a point destructive to the substantial unity of the political body, turning their transitory differences into permanent divisions, . . .

"Proportional representation, in effect, contributes to atomize political representation, promoting the proliferation of small groups in detriment of big parties, which are the only ones capable of putting into practice a government program."

(Italics ours.) [Pp. 259-261]

As we have said, in the 1972 election the People's Party, party for which Sánchez Vilella was nominated for Representative at Large, did not qualify as minority party. Its candidate for Governor received 30.8 of one per cent of the total votes cast for the office of Governor. The aforecited sec. 89(a) provided that to be entitled to additional candidates, pursuant to Sec. 7 of Art. III of the Constitution, a minority party should receive five per cent or more of the total number of votes cast in favor of all the candidates for Governor. As we said before, the Commonwealth Board of Elections certified eleven Representatives at large plus two additional representatives for the Independence Party and one

for the New Progressive Party. The last two parties qualified as minority parties since they obtained more than five per cent of the votes cast for the office of Governor and, in obedience to the law, the Commonwealth Board of Elections determined it thus.

At no time did the trial court conclude that sec. 89(a) of the Election Law, 16 L.P.R.A. § 276, was void or unconstitutional. However, it concluded that the Commonwealth Board of Elections should "dispense with" that provision of law. It is surprising that a Judge who in the exercise of his office personifies the law, instruct a public agency to dispense with a statutory provision which is perfectly valid and in force.

In the light of the afore-stated facts and of the applicable Puerto Rican law we are constrained to conclude that the trial court committed also errors 3, 4, and 6. Those errors as well as error No. 2 having been committed, and that being sufficient to justify the reversal of the judgment appealed from, we do not think it is necessary to discuss errors No. 1 and No. 5.

In their briefs plaintiffs make deep incursions into the United States case law. We have no compláint whatsoever against that, but we understand that the said law, excellent as it is, does not make it necessary for us to modify our decision as it has been expressed here.

The judgment appealed from will be reversed.

Mr. Chief Justice and Mr. Justice Dávila took no part in the decision of this case. Mr. Justice Torres Rigual and Mr. Justice Martín concur in the result. Mr. Justice Martín shall issue a concurring opinion. Mr. Justice Díaz Cruz besides voting in favor of the opinion of the court issued also a concurring vote.

OLD/amp-is

IN THE SUPREME COURT OF PUERTO RICO

Jaime B. Fuster et al.,

Plaintiffs and appellees

v.

Walter Busó et al. and
Puerto Rican Independence Party,

Defendants and appellants

Appeal from the Superior Court, San Juan Part

No. 0-73-469

Mandamus

MR. JUSTICE MARTÍN, concurring.

San Juan, Puerto Rico, May 31, 1974

I concur in the result of the opinion of the Court because I understand that since the People's Party did not succeed in obtaining five per cent or more of the minimum votes cast for all the candidates for Governor, Sánchez Vilella lost his right to representation granted to minority parties by the provision contained in Art. III, § 7 of our Constitution, as it has been implemented by sec. 89(a) of the Election Law (16 L.P.R.A. § 276).

The representation provided by the Constitution for minority political parties constitutes one of the most remarkable improvements in the Puerto Rican electoral process. The scope of said provision, in my opinion, contributes to give certain stability to the political regime, since a political party which is in full control of the legislative bodies, at a given moment, without it having internal voices to lessen the excesses that said majority party may incur, may lead a government to tyranny or to corruption. In other words, such an absolute dominion, even if it is the product of the popular will, may carry within itself the seed which, if it germinates, may ruin the raison d'etre of democracy. That is why the members of the Constitutional Assembly, very wisely granted the right to representation of the minority parties in the event, and only in the event, that a party elected more than two thirds of the members of any or of both legislative Houses.

Such right granted to the minority parties, in succeeding to obtain a constitutional rank, strengthens the democratic process, and it cannot be set aside without it being thus determined by the will of the people, which is the source of the public power.

Petitioners allege that Sec. 7 of Art. III of the Constitution of the Commonwealth of Puerto Rico is vague and imprecise insofar as it fails to define what is a party and what is a ticket (candidatura). They argue, then, that in referring to "ticket" and "minority political party" the members of the Constitutional Convention meant "sectors or views of public opinion," reason why the constitutional clause about minorities was a ". . . guarantee so that the different views of the public opinion be represented in the Legislative Assembly." 4 Diario de Sesiones de la Convención Constituyente), 2596. And, referring to the Report of the Legislative Committee of said Constitutional Assembly, they cite the following expression:

> "This formula of guarantee of the minorities has been created and recommended by the Committee as a measure of the just interpretation of the will of the People and not as a grant to political parties." 4 Diario de Sesiones de la Convención Constituyente, 2596.

A reading of the citations made by petitioners with regard to the statements shed by some of the members of the Constitutional Convention, in the light of the language used in the first and last paragraphs of sec. 7,[1] leaves no doubt that the terms "ticket" and "party"

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[1] "The measures necessary to implement these guarantees, the method of adjudicating fractions that may result from the application of the rules contained in this section, and the minimum number of votes that a minority party must cast in favor of its candidate for Governor

were to be defined by law, and that in order to qualify as a minority party it had to receive a minimum of votes in favor of its candidate for Governor, minimum which was to be fixed by law. Later, sec. 89(a) of the Election Law (16 L.P.R.A. § 276) designed the mechanism necessary for a minority party to achieve the minority representation granted by sec. 7 of Art. III, without mentioning at all the "sectors" or "views" of opinion, since these concepts referred to political parties. Furthermore, sec. 89(a) of the Election Law clearly establishes that "a ticket" is the aggregate number of candidates nominated by a single party in its own column on the election ballot, and in the case of "parties" which were considered as having formed a coalition for the immediately preceding general election, or which shall be considered as having formed a coalition for the immediately following general election, the aggregate number of the candidates of said parties nominated in their own columns on the election ballot. In short, sec. 89(gives effectiveness to the aforementioned constitutional provision which referred to "a single party" or "under a single ticket." The term "ticke includes the aggregate of the total candidates nominated by a single party as well as those nominated by two or more coalitioned parties. Any imprecision or vagueness in the constitutional provision in question was clarified by legislation to that effect which the Legislative Assembly approved "by express delegation of the Constitution."

The requirement imposed by sec. 89(a) of the Election Law with regard to the percentage of votes which the candidate for Governor of a minority party should receive to be entitled to the minority representation granted by sec. 7 of Art. III is reasonable and therefore constitutionally per-

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in order to have the right to the representation provided herein shall be determined by the Legislative Assembly."

missible. See Jenness v. Fortson, 403 U.S. 431 (1971). The State is entitled to demand the existence of a substantial backing of the electorate to a political party in order to protect itself from frivolous or numerous tickets. During the meetings of the Constitutional Convention there were expressions in the sense that the proliferation of parties and the artificial conservation of parties which did not have enough electoral force, with the subsequent division in the political responsibility before the people, weaken democracy, since the multiplication of small political parties makes them weak to express their opinions. 3 Diario de Sesiones 2026, 2028. This view coincides with the one stated by Madison in the writings published during the years when the formation of the United States of America was debated when he said that the fragmented parties and the unbridled factionalism could cause serious damages to the governmental tissue. The Federalist, No. 10 (Madison.)

We are not dealing here with an independent candidate who in view of the cross-road of choosing to be an independent candidate without linking himself to a political party, finds out that the requirements of law to do so are extremely burdensome. It is known that in those cases the State must provide him an accessible opportunity. Storer v. Brown, No. 72-812, decided on March 26, 1974. See Williams v. Rhodes, 393 U.S. 23 (1968).

In view of the grounds set forth herein, I concur in the result of the opinion of the Court.

OLD/amp

IN THE SUPREME COURT OF PUERTO RICO

Jaime B. Fuster et al.,

Plaintiffs-appellees,

v. No. O-73-469

Walter Busó et al. and
Puerto Rican Independence Party, Mandamus

Defendants-appellants.

Personal Vote of MR. JUSTICE DIAZ CRUZ.

San Juan, Puerto Rico, May 31, 1974.

I concur fully with the majority opinion.

There is considerable argument between the parties as to the purpose of the Constitutional Assembly of giving representation in the Legislature to the so-called groups of the minority opinion. There is no better knowable test to recognize a group of opinion than its consolidation into a political party, thing which undoubtedly led the Constitutional Convention to link the minority representation to the concept "Party" instead of "candidate" when it wrote Art. III, Sec. 7 of our Constitution.[1]

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[1] In following that course the Constitutional Assembly and subsequently the People exalted one of the basic liberties of democracy, to assemble in political groups. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. [Citations] The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom. [Citations]." Kusper v. Pontikes, 414 U.S. 51 (1973), 38 L.Ed.2d 260. An equal protection is offered by Art. II,

The trial court declared the aforecited sec. 7 inoperative and held back by the provisions of the Bill of Rights of the Constitution of the Commonwealth because it understood that it impairs the principle that each vote should have the weight comparable to the full participation of the voter who cast it. The Constitution is a whole and it should be construed with due respect to the integrity of each and every one of its provisions. The civil rights of the People who approved the Constitution with their votes, were not only guaranteed, but governed by the popular will itself that in a spontaneous manner approved the method of electing lawmakers for the minority under Art. III, Sec. 7. I do not find therein any erosion of rights superior to others, but a self-imposed restriction, freely consented to by the People itself upon approving its Constitution.

Sec. 4 (right of the People to assemble peacefully and to petition the Government for a redress of grievances) and Art. II, Sec. 7 (no person shall be deprived of his liberty nor shall be denied the equal protection of the laws) of the Constitution of the Commonwealth of Puerto Rico.

Joint Appendix

Office - Supreme Court, U.S.
FILED
DEC 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-328

IN THE

Supreme Court of the United States

October Term, 1981

JESUS RIVERA RODRIGUEZ, *et al.*,
Appellants,

v.

POPULAR DEMOCRATIC PARTY, *et al.*,
Appellees.

On Appeal from the Supreme Court of Puerto Rico

JOINT APPENDIX

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APPEAL DOCKETED AUGUST 19, 1981
PROBABLE JURISDICTION NOTED OCTOBER 19, 1981

JOINT APPENDIX

Table of Contents*

	Page
Statement of Relevant Proceedings In Lieu of Relevant Docket Entries—Superior Court (No. PE-81-316 (907))	iii
Statement of Relevant Proceedings In Lieu of Relevant Docket Entries—Supreme Court (No. 0-81-150 and No. R-81-118)	iv
Complaint	1
Exhibit I—A letter from Miguel A. Hernandez Agosto to Hon. Governor Carlos Romero Barcelo	7
Exhibit II—An Opinion of the Secretary of Justice	9
Exhibit III—A letter from Hon. Governor Carlos Romero Barcelo to the Administrator of the State Commission of Elections	18
Exhibit IV—Letter from Hon. Governor Carlos Romero Barcelo to the President of the Popular Democratic Party, Hon. Miguel A. Hernandez Agosto	20
Exhibit V—A Letter of Convocation, dated February 26, 1981	23
Exhibit VI—A Proclamation, dated July 20, 1979	26
Exhibit VII—An Opinion of Miguel A. Pagan, Esq. about the Interpretation of Article 5.006 of the Electoral Law	28

* All papers filed in the courts below are in Spanish. Reprinted in this Joint Appendix are translations prepared by the Clerk of the Supreme Court of Puerto Rico or agreed upon by counsel for the appellants and counsel for the appellee.

Page

Exhibit VIII—A letter from the Administrator of the State Commission of Elections to the Secretary of Justice of the Commonwealth of Puerto Rico, dated October 9, 1979 31

Exhibit IX—A Letter of Convocation to fill the vacancy of Representative Mr. Alejandro (Junior) Cruz 33

Exhibit X—A Model Ballot Sheet for the filling of the vacancy of Representative Alejandro (Junior) Cruz 34

Answer of Governor of Puerto Rico 35

Answer of General Administrator of Elections 39

Petition to Intervene 43

Certification, dated March 6, 1981, filed by the Governor of Puerto Rico at hearing before Superior Court 46

Certificate, dated March 6, 1981, filed by the Governor of Puerto Rico at hearing before Superior Court 48

Opinion and Judgment of Superior Court 50

Memorandum dated March 25, 1981, attached as Appendix to brief of Respondents-Appellees before Supreme Court 51

Opinions of Supreme Court of Puerto Rico 53

Judgment of Supreme Court of Puerto Rico 53

STATEMENT OF RELEVANT PROCEEDINGS IN LIEU OF RELEVANT DOCKET ENTRIES* SUPERIOR COURT OF PUERTO RICO DOCKET NO. PE-81-316 (907)

1981	FILINGS-PROCEEDINGS
March 3	COMPLAINT by Popular Democratic Party, with Exhibits I-X
March 6	ANSWER by Governor
March 6	ANSWER by General Administrator of Elections
March 6	PETITION TO INTERVENE by Intervenors
March 9	CERTIFICATIONS by Governor
March 9	HEARING at which case argued; case taken under advisement
March 20	OPINION AND JUDGMENT
March 24	NOTICE OF APPEAL to Supreme Court of Puerto Rico by Intervenors

*There are no docket sheets in either of the courts below listing the dates on which papers were filed, hearings were held, and orders were entered. However, counsel for appellants and appellee have agreed on the above statement of relevant proceedings in lieu of relevant docket entries.

STATEMENT OF RELEVANT PROCEEDINGS IN LIEU OF RELEVANT DOCKET ENTRIES* SUPREME COURT OF PUERTO RICO DOCKET NOS. 0-81-150, R-81-118

1981	FILINGS-PROCEEDINGS
March 24	PETITION FOR REVIEW of judgment of Superior Court by Governor, with Exhibits I-VIII (R-81-118)
March 26	RESOLUTION of Supreme Court ordering issuance of writ of review (R-81-118) and consolidating petition for review with appeal by Intervenors (0-81-150)
March 26	MOTION FOR ORDER IN AID OF JURISDICTION by Governor, seeking stay of judgment of Superior Court
March 27	MOTION TO STAY PROCEEDINGS by Intervenors, seeking stay of judgment of Superior Court
March 27	RESOLUTION of Supreme Court staying judgment of Superior Court, with concurring opinion
March 27	MANDATE of Supreme Court to Superior Court ordering transmission of record on review
April 10	APPELLANT'S BRIEF by Governor
April 10	APPELLATE BRIEF by Intervenors, with Appendices I-V
April 10	BRIEF OF THE RESPONDENT-APPELLEE by Popular Democratic Party, with Appendix

*There are no docket sheets in either of the courts below listing the dates on which papers were filed, hearings were held, and orders were entered. However, counsel for appellants and appellee have agreed on the above statement of relevant proceedings in lieu of relevant docket entries.

May 8 PER CURIAM OPINION AND JUDGMENT, with four separate or dissenting opinions

May 14 MOTION FOR RECONSIDERATION by Governor

May 22 MOTION FOR RECONSIDERATION by Intervenors

May 27 RESOLUTION denying motions for reconsideration

May 28 NOTICE OF APPEAL to Supreme Court of United States by Intervenors

May 28 PETITION TO STAY MANDATE by Intervenors

June 2 RESOLUTION staying mandate for non-renewable term of 30 days

June 2 CERTIFIED LETTER from Intervenors to Clerk of Supreme Court of Puerto Rico requesting translation of entire docket

July 2 CHIEF CLERK'S CERTIFICATE from Clerk of Supreme Court of Puerto Rico transmitting photocopies of official translation from Spanish into English

July 3 MANDATE issued to Superior Court

IN THE

SUPERIOR COURT OF PUERTO RICO

SAN JUAN, PUERTO RICO

POPULAR DEMOCRATIC PARTY, *Plaintiff*	Civil No. PE-81-316 907
v.	Re:
CARLOS ROMERO BARCELO, Governor of Puerto Rico and GERINELDO BARRETO PEREZ, General Administrator of Elections, *Defendants*	Declaratory Judgment and Injunction

---

COMPLAINT

TO THE HONORABLE COURT:

Comes now the Plaintiff through the undersigned attorneys and very respectfully states and prays:

1. On January 28, 1981, the Hon. Ramón Muñiz, elected House Representative, died.

2. The Honorable Ramón Muñiz was elected during the General Elections of November 4, 1980, to fill the seat corresponding to Representative District No. 31 which includes Precinct 86 of Caguas.

3. Honorable Ramón Muñiz ran as a candidate for the Popular Democratic Party for House Representative for District 31.

4. The Honorable Governor of Puerto Rico, Carlos Romero Barceló asked the Secretary of Justice to render an opinion stating the scope of the constitutional and statutory provisions with regard to the filling of a vacancy of District Representative before the fifteen (15) months immediately preceding the date of the following general election.

5. On February 11, 1981, the Popular Democratic Party, through a letter signed by its President, the Hon. Miguel A. Hernández Agosto, requested from the Governor of Puerto Rico, Carlos Romero Barceló, to call a by-election pursuant to the provisions of art. 5.006 of Act No. 4 of December 20, 1977, Puerto Rico Electoral Act. (See Exhibit I.)

6. On February 12, 1981, the Hon. Acting Secretary of Justice, Attorney Ralph Skelly, issued an opinion which, in brief, holds that the procedure to be followed to fill the vacancy in question is the following: (See Exhibit II.)

> a. The Governor, with the advice of the Commission calls, within the thirty days following the date on which the vacancy occurs, a by-election in the district affected by the vacancy. Said election shall be held no later than the ninety days following the date of the call but not before the sixty days following the date when the vacancy occurred.
>
> b. If within the sixty days following the date of the vacancy the party to which the legislator of the vacant seat belonged has not presented a slate to fill the same, the office shall be deemed to be that of an independent legislator, and any elector affiliated to a political party or any duly qualified elector may be presented as a candidate in the election.

c. If within the sixty days the party to which the legislator who caused the vacancy belonged presents a slate, no other elector may be presented as candidate to represent a political party different from that to which the legislator of the vacant seat belonged. Nevertheless, any duly qualified elector may be presented as candidate in the election even if he does not belong to the political party to which the legislator of the vacant seat belonged. In said case, said elector shall be presented as an independent candidate.

d. The Governor, pursuant to the provisions of art. 5.007 of the Electoral Law shall call all the electors of the geographic district where the election is held, without restricting the participation of the electors duly qualified as such.

7. On February 17, 1981, Carlos Romero Barceló, Honorable Governor of Puerto Rico, requested the Commonwealth Election Commission to recommend him a date to hold the by-election and advise him on the technical matters. (See Exhibit III.)

8. On February 18, 1981, the Hon. Governor of Puerto Rico, Carlos Romero Barceló, sent a letter to Hon. Miguel A. Hernández Agosto, President of the Popular Democratic Party, informing him of his intention to call a by-election in Representative District No. 31, according to the legal analysis and the recommendations of the Secretary of Justice. (See Exhibit IV.)

9. The Commonwealth Election Commission, with the vote of the General Administrator of Elections, and the abstention of the Electoral Commissioners of the P.D.P. and P.I.P., recommended the Hon. Governor, Carlos Romero Barceló, to call the by-election on May 24, 1981.

10. On February 26, 1981, the Hon. Governor of Puerto Rico, Carlos Romero Barceló, issued a call for the holding of the by-election to fill the vacancy left by the death of Representative Ramón Muñiz, to be set for May 24, 1981. (See Exhibit V.)

11. The General Administrator of Elections intends to carry out the by-election in the manner determined by the Hon. Governor of Puerto Rico, Carlos Romero Barceló, in his call.

12. The determination of the Hon. Governor of Puerto Rico, Carlos Romero Barceló, in this case is different to that taken when a vacancy first occurred in the office of district representative, under art. 5.006 of the Electoral Law in force, even though similar situations are involved. (See Exhibit VI.)

13. When that first vacancy occurred for the Office of District Representative under the electoral law now in force due to the resignation of Representative Alejandro (Jr.) Cruz, the Commonwealth Election Commission, composed of the three Electoral Commissioners who participated in the interpretation of the Act, adopted an opinion issued by Mr. Miguel A. Pagán, Legal Advisor of the Commonwealth Election Commission where he held, that only those electors affiliated to the political party to which the legislator who had left the vacancy belonged could vote in the by-election held to fill the vacancy left, in this case, only the members of the New Progressive Party could vote. (See Exhibit VII.)

14. On October 9, 1979, the General Administrator of Elections sent a letter to the Secretary of Justice informing him of the decision of the Commonwealth Election Commission to call only the members of the New Progressive Party to the by-election to be held to fill the

vacancy left by Representative Alejandro Cruz and asking for an opinion as to that particular. The Secretary of Justice never answered the petition of the Commonwealth Election Commission. (See Exhibit VIII.)

15. On August 7, 1979, the Secretary-General of the New Progressive Party issued a call to all the bona fide electors of the New Progressive Party of Precincts 112 and 113 to participate in the by-election to elect the substitute to fill the vacancy left by the resignation of Representative Alejandro (Junior) Cruz. (See Exhibit IX.)

16. The Commonwealth Election Commission ordered the printing of a ballot for the by-election to be held to fill the vacancy left by Representative Alejandro Cruz, which said "New Progressive Party By-Election" and had the emblem of said party (See Exhibit X.)

17. The intention of the Hon. Governor of Puerto Rico of calling to a by-election of Representative District No. 31, all the electors of the District and to leave the same open for the presentation of candidates who are not affiliated to the Popular Democratic Party is contrary to the letter and spirit of Art. III, Sec. 8, of the Constitution of the Commonwealth of Puerto Rico and to arts. 5.006 and 5.007 of the Electoral Law in force, to the initial interpretation given to these provisions by the persons who approved them and to that given by the administrative organism in charge of making them effective.

18. The decision of the Hon. Governor of Puerto Rico of opening the by-election to all voters who are not affiliated electors of the Popular Democratic Party deprives the Popular Democratic Party, and the electors who voted for said Party's candidate for Representative of District No. 31, of the effect of the electoral mandate issued in the General Elections of November 4, 1980, and of the equal protection, all these in violation of the provisions of Secs. 2 and 7 of the Constitution of the Commonwealth of Puerto Rico.

WHEREFORE, in view of the foregoing, we respectfully pray this Hon. Court to find for Plaintiff and consequently, determine that in the by-election to be held to fill the vacancy left by the death of Representative Ramón Muñiz in District No. 31, only candidates and electors affiliated to the Popular Democratic Party participate, and to issue an injunction enjoining any other candidate or elector who is not a member affiliated to the Popular Democratic Party, from voting in said by-election and to issue any other pronouncements pertinent at law.

In San Juan, Puerto Rico, this 2nd day of March 1981.

PEDRO E. ORTIZ ALVAREZ
JOSE A. ANDREU GARCIA
GUILLERMO MOJICA MALDONADO
Attorneys for Plaintiff
Box 5782
San Juan, Puerto Rico 00906
Tel. 723-5681, 725-1717

By: GUILLERMO MOJICA MALDONADO
Guillermo Mojica Maldonado

Exhibit

[EXHIBIT I]

POPULAR DEMOCRATIC PARTY

OFFICE OF THE PRESIDENT

San Juan, Puerto Rico

February 11, 1981

Hon. Carlos Romero Barceló
Governor
La Fortaleza, San Juan

Dear Mister Governor:

As you know, there is a vacancy in the House of Representatives, since last January 28th, due to the death of Representative Ramón Muñiz, who had been elected by the Popular Democratic Party.

Article 5-006 of the Electoral Law of Puerto Rico, approved in 1977, stipulates that in a case like this, the Governor shall convoke a special election within thirty days after the date in which the vacancy occurs. It also provides that the Political Party, to which the legislator's seat belonged, will have a sixty-day period to submit a candidacy or list of candidates.

This legal provision was established by the State Commission of Elections and by you as Governor, as well as by the officers of your Political Party in an identical case originated by the resignation of Representative Alejandro Cruz. As in this case, Mr. Cruz was a Representative elected by a District, he had taken an oath as a legislator, he had been nominated by a Political Party and his resignation originated before the previous fifteen-month period before a general election. All these circum-

stances are equally present in the vacancy oringinated by the death of our dear colleague, Representative Ramón Muñiz.

According to the above, I take the liberty of requiring that you do not let the term provided by law expire for the convening of the electors of the Popular Democratic Party in Representative District Thirty-first (31) for a special election, since in this case, the Legislature is in session and the actual situation of the House of Representatives requires the prompt establishment of procedures directed to fill the above vacancy.

The urgency of this case and the precedent that exists of an equal case under your incumbency as Governor during the previous four years, guarantee a prompt convocation to a special election among the electors of the Popular Democratic Party, the same way that it was previously done with the electors of the New Progressive Party eighteen (18) months ago.

I trust that you will proceed with great diligence in this case for the benefit of the people of Puerto Rico.

Cordially,

Miguel A. Hernández Agosto

leo

[EXHIBIT II]

COMMONWEALTH OF PUERTO RICO

OFFICE OF THE SECRETARY OF JUSTICE

Box 192, San Juan, Puerto Rico 00902

Please Address
Correspondence
to the Secretary

February 12, 1981

Hon. Carlos Romero Barceló
Governor
La Fortaleza
San Juan, Puerto Rico

Dear Mister Governor:

Reference is made to your dispatch, in which you request my opinion, as to the procedure required by the Constitution and the Laws of the Commonwealth of Puerto Rico to fill the vacancy in the seat of a district representative, before the fifteen-month period immediately preceding the date of the next general election.

The said vacancy originated because of the death of Representative Ramón Muñiz, of the Representative District Thirty-One (31), last January 28, 1981. When Mr. Muñiz died, he was performing his duties as a legislator, an office to which he was elected in the General Elections of last November.

You specifically request "an interpretation of Article 5.006 of the Electoral Law of Puerto Rico, in view of the applicable constitutional provisions and that [you] be particularly instructed as to the duties and/or acts that the Governor should do in compliance with the Law."

I hereby refer to the requested study.

Article 5.006 of the Electoral Law of Puerto Rico, in force, stipulates as follows:

"Article 5.006—Special Elections—Whenever a vacancy occurs in the office of a Senator or Representative elected as an independent candidate for a district or *when a vacancy occurs to the office of a Senator or Representative for a district nominated by a political party before the fifteen (15) month period preceding the date of the next general election, the Governor, after having consulted with the Commission, will convoke, within thirty (30) days after the date on which the vacancy occurs, the holding of a special election in the concerned district. The Said election should be held not later than ninety (90) days after the date of the convocation and the person elected in the same will hold office until the term of his predecessor expires.*

If within a term of sixty (60) days after the date of the vacancy, the party to which the legislator of the vacant seat belonged does not present a list of candidates to fill the same, the seat will be considered as if it were of an independent legislator for the purposes of the holding of a special election to fill it.

In case the vacant office belonged to an independent candidate, any elector affiliated to a political party of any person duly qualified as an elector and who meets the requirements that the position in question demands, may run as a candidate in the said election.

When a vacancy occurs in the office of Senator or Representative at Large nominated by a party, or when within the fifteen (15)

> months preceding a general election, a vacancy occurs in the office of a district Senator or Representative, the same will be filled by the President of the corresponding Chamber, upon the proposal of the political party to which the said Senator or Representative belonged with a person selected in the same manner as his predecessor was selected." (Emphasis added.)[1]

In turn, the Constitution of the Commonwealth of Puerto Rico, in its Article IV, Section 8, as approved in 1952, as to what concerns this case, stipulated as follows:

> "The term of the Office of the Senators and Representatives will begin on January the second (2nd) immediately after the date on which the general election was held and on which they have been elected. *When a vacancy occurs in the office of a district Senator or Representative, before the fifteen (15) month period immediately preceding the date of the next general election, the Governor will convoke a special election in the said District, within thirty (30) days after the date in which the vacancy occurs, and the same shall be held not later than ninety (90) days after the convocation is issued, and the person elected in the said special election will hold office until the term of his predecessor expires.*"

As you can observe, the above mentioned Article 5.006 contains a similar text as the one provided in the said constitutional provision. It seems that when the Electoral Law in force was approved in 1977, they used as a guide for the wording of Article 5.006 what was provided in the original Section 8 of the Third Article of the Constitution.

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[1] 16 L.P.R.A. sec. 3206.

In the year 1964 the Legislature of Puerto Rico adopted a proposal in order to amend Section 8 of Article III of the Constitution, which was approved in the 1964 Elections.

The new constitutional text was approved in the following manner:

> "The term of the office of the Senators and Representatives will begin on January the Second (2nd) after the date in which the General Election is held and in which they have been elected. *When a vacancy occurs in the office of a district Senator or Representative, the said vacancy will be filled as provided by law.* When the vacancy occurs in the office of a Senator or Representative at Large, the same will be filled by the President of the corresponding Chamber, upon the proposal of the party to which the Senator or Representative, whose office would be vacant, belonged, with a candidate selected in the same manner as his predecessor. The vacancy of an Office of Senator or Representative at Large elected as an independent candidate, will be filled by an election in all the districts." (Emphasis added.)

Even when there are expressions in the legislative record of the Senate of Puerto Rico to the effect that the purpose of the constitutional amendment was that political parties could propose the candidates to fill the vacant offices, the truth is that from the records of the House of Representatives, the body in which the measure originated, it is clear that the intention and the purpose of the same was to leave at the entire discretion of the Legislature how to fill the vacancies in the offices of district senators and representatives. When the above mentioned constitutional amendment was approved, the People of

Puerto Rico empowered the Legislature to provide the procedure to fill the vacancies without determining any type of criteria to the Legislature that would circumscribe or restrict the granted discretion.

In the exercise of the authority granted by the Constitution, the Legislature adopted Article 5.006 of the Electoral Law that, as the title indicates, establishes the procedure of special elections when a vacancy occurs in the office of a district senator or representatives nominated by a political party before the fifteen- (15) month period preceding the date of the next general elections. The text of the first paragraph of this Article is clear and free of ambiguity: the Governor is forced to convoke a special election within thirty (30) days after the date in which the vacancy occurs. The imperative and commanding terms used in this provision of the law (the Governor *"will convoke"* a special election that "should be *held*"), imposes on the Governor the ministerial duty to carry out the act ordered.

Article 5.007 of the same Electoral Law tells us who will vote in a special election:

> "In a special election all the electors of the geographical demarcation in which the same should be held will vote, with the right to do so according to the convocation issued to that effect by the Governor of Puerto Rico."[2]

Article 14 of the Civil Code of Puerto Rico (31 L.P.R.A. Sec. 14) established the following principle:

> "When the law is clear and free of all ambiguity, the letter of the law should not be ignored under the excuse of carrying out its spirit."

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[2] 16 L.P.R.A. Sec. 3207.

The Supreme Court of Puerto Rico stated in the case of *Caguas Bus Line v. Sierra,* 1952, 73 D.P.R. 185, that the simple and absolute language of a statute cannot be limited by interpreting it in such a way that it provides something not intended by the legislature to be provided.

If the Legislature had wanted that in the said special election only the electors of the political party to which the legislator of the vacant office belonged should vote, they would have expressly provided that, but the Legislature was clear and categorical in providing that in the special election all the electors of the geographic demarcation will vote.

If the purpose of the Legislature had been that the procedure to fill the vacant office was through the holding of a primary election and not by a special election, it would have been thus provided. The Electoral Law in force is divided into eight (8) titles. Title IV comprises everything relative to "Candidacies and Primaries." Articles 5.006 and 5.007 of the Law were not classified by the Legislature within the title that contains the provisions about the primaries. On the contrary, these articles were included in Title V of the Law that comprises the procedures before the election and the same Article 5.006 is entitled "Special Elections." In the case of *Pueblo v. Ramos,* 18 D.P.R. 993, the Supreme Court of Puerto Rico held that the articles of a code should be interpreted having in mind the purpose of the said articles as is evident in the title of the chapter, so that all its provisions may be in harmony.

The Legislature does not legislate superfluous things. Everything expressed in law has some reason and one should always give it a meaning.

The present Electoral Law establishes in its Article 2.001 the rights and prerogatives that electors of Puerto Rico have. One of these rights is the following:

"The prevalence of the electoral rights of the citizen over and above the rights and prerogatives of all the parties and political associations."

The norm set out in Articles 5.006 and 5.007 of the Electoral Law that allows the participation of all the electors of the demarcation in a special election that is to be held in order to elect the legislator that will occupy the vacant office, constitutes a measure that faithfully responds to the above cited right, inasmuch as it recognizes the prevalence of the right to vote of all the electors over any right that the political party could or might have on the vacant seat.

Having no doubt as to the real purpose and meaning that enlivens Articles 5.006 and 5.007, which is to consecrate the right of all the electors to participate in the special election that would be held, we proceed to examine the second paragraph of Article 5.006. In the said paragraph a right is granted to the political party to which the legislator of the empty seat belonged and that right is the possibility of presenting a list of candidates to fill the same. If the political party does not present such list of candidates, the same law provides that the seat will be considered as if it were one of an independent legislator, for the purpose of holding a special election to fill the vacancy. The consequences that considering the seat as one of an independent legislator has is that any elector can run as a candidate, even when he represents a political party.

It is a recognized principle of interpretation that the statutes should be interpreted as an entity in order to give a meaning to all its provisions, without omitting one, providing what might be missing or might be obscure in a paragraph of the law with what has been provided in the other one (*Descartes, Tes. v. Tribunal de Contribuciones,*

71 D.P.R. 248; *Central Coloso v. Descartes, Tes.* 74 D.P.R. 481; *Orta v. Registrador,* 60 D.P.R. 789; *Nadal v. American P.R. Company,* 19 D.P.R. 1080; *General Motors Acceptance v. Tribunal de Distrito,* 70 D.P.R. 941). Based on this legal principle, the first and second paragraphs of Article 5.006 can be harmonized without annulling, omitting nor setting aside any of its provisions in the following manner:

a. The Governor, after having consulted with the Commission, convenes, within thirty (30) days after the date in which a vacancy occurs, for the holding of a special election in the district where the vacancy occurred. The said election will be held not later than ninety (90) days after the date of its convocation but not also before the sixty (60) days after the date of the vacancy.

b. If within the sixty (60) days after the date of the vacancy the political party to which the legislator of the vacant seat belonged does not present a list of candidates to fill the same, the seat will be considered as if it were one of an independent legislator and any elector affiliated with a political party or a person duly qualified as an elector could run as a candidate in the election.

c. If within sixty days the political party to which the legislator of the vacant seat belonged presents a list of candidates, no other elector could run as a candidate in representation of a different political party than the one to which the legislator of the empty seat belonged. Nevertheless, any duly qualified elector could run as a candidate in the election even though he might not belong to the political party to which the legislator of the vacant seat belonged. In such a case, the said elector should run as an independent candidate.

d. The Governor, in compliance with the provisions of Article 5.007 of the Electoral Law, will convoke all the electors of the geographic demarcation where the election will be held, without establishing any restrictions in the participation of the electors duly qualified as such.

In my opinion, through the preceding interpretation, the correct sense of the justice that enlivens the provisions of the Electoral Law of Puerto Rico would be established.

Cordially,

Ralph T. Skelly
Acting Secretary of Justice

[EXHIBIT III]

OFFICE OF THE GOVERNOR

LA FORTALEZA

San Juan, Puerto Rico 00901

February 17, 1981

Gerineldo Barreto Pérez, Esq.
Administrator
State Commission of Elections
San Juan, Puerto Rico

Dear Mister Administrator:

By virtue of Article 5.006 of Law Number Four (4) of December 20, 1977, as amended, which provides:

> "Whenever a vacancy occurs in the office of a Senator or Representative elected as an independent candidate for a district or when a vacancy occurs in the office of a district Senator or Representative nominated by a political party before the fifteen (15) month period preceding the date of the next general election, the Governor, *after having consulted with the Commission*, within thirty (30) days after the date in which the vacancy occurs, will convoke the holding of a special election in the concerned district.

I hereby notify you of my desire to convoke a special election in Representative District Number Thirty-One (31), due to the vacancy originated by the death of Representative Ramón Muñiz, and I request from the State Commission of Elections the appropriate legal advice as to the date on which the said special election will

be held, as well as any other technical information of electoral nature that the Commission may deem best to submit to me.

Cordially,

Carlos Romero Barceló

[EXHIBIT IV]

OFFICE OF THE GOVERNOR

LA FORTALEZA

San Juan, Puerto Rico 00901

February 18, 1981

Mr. Miguel A. Hernández Agosto
President
Popular Democratic Party
San Juan, Puerto Rico

Dear Attorney Hernández Agosto:

Reference is made to your letter of February 11, 1981 concerning the vacancy in Representative District Number Thirty-One (31) as a result of the death of Representative Ramón Muñiz.

Section 2 of Article II of the Bill of Rights of our Constitution provides that the laws will guarantee the expression of the will of the people through universal, equal, direct and secret suffrage, and will protect the citizen against any action in the exercise of the electoral prerogative.

This constitutional postulate represents one of the most precious values of our collective life. Such a provision is, without any doubt, the fundamental milestone in which the citizen's participation lies, the same being directed toward the accomplishment of the free and voluntary selection of those leaders that will be in charge of the destiny of our people.

This constitutional postulate permeates all the electoral activity, including the procedures to fill the representatives vacancies. Even more, it is the basis for the

respect and the recognition of the electoral rights of our citizens.

Article 5.006 of Puerto Rico's Electoral Law provides that in a situation similar to the one that has occurred in Representative District Number Thirty-One (31), the Governor will convoke a special election in the District affected by the vacancy, within thirty (30) days after the date of the said vacancy.

The said Article also provides that if within the sixty (60) day period after the date of the vacancy the political party to which the legislator of the vacant seat belonged does not present a *list of candidates* to fill the same, the seat will be considered as if it were one of an independent legislator for the purpose of holding a special election to fill the office.

During the year 1979, when Representative Alejandro Cruz resigned, a similar situation but not exactly the same as the situation object of this analysis, arose. Representative Cruz was a representative elected by a District, he had taken an oath as legislator, he had been nominated by a political party and his resignation occurred very near to the fifteen (15) month period preceding a general election. Nevertheless, on that occasion, only the New Progressive Party showed concern with respect to the filling of the said vacancy. No other political party showed any interest, nor requested, nor participated in the said special election.

I plan to convoke a special election in Representative District Thirty-One (31) by virtue of the provisions contained in Article 5.006 of the Electoral Law of Puerto Rico and in accordance with the legal analysis and the recommendations made by the Secretary of Justice of Puerto Rico (legal opinion herewith attached) with the purpose of protecting the electoral rights of the citizens of Representative District Thirty-One (31), upholding and

respecting, therefore, the constitutional postulates that promote them.

The seat of this representative district belongs to the citizens that reside in the said district and not to any particular political party.

Cordially,

Carlos Romero Barceló

[EXHIBIT V]

COMMONWEALTH OF PUERTO RICO

LA FORTALEZA

San Juan, Puerto Rico

Administrative
Bulletin
Number 3853

LETTER OF CONVOCATION

OF THE GOVERNOR OF PUERTO RICO FOR THE HOLDING OF A SPECIAL ELECTION IN REPRESENTATIVE DISTRICT NUMBER THIRTY-ONE (31) OF CAGUAS

WHEREAS: On January 28, 1981, a vacancy occurred for the office of District Representative in the House of Representatives of the Commonwealth of Puerto Rico, which corresponds to Representative District Thirty-One (31), due to the death of Attorney Ramón Muñiz, who was elected for the said position in the General Elections held, in Puerto Rico, on November 4, 1980.

WHEREAS: Article III, Section 8 of the Constitution of the Commonwealth of Puerto Rico, provides:

> "When a vacancy occurs in the office of a District Senator or Representative, the said vacancy will be filled as stipulated by law."

WHEREAS: Article 5.006 of the Electoral Law of Puerto Rico, Law Number 4 of December 20, 1977, establishes the procedure to follow when a vacancy occurs in the office of a District Senator or Representative, nominated by a political party, before the fifteen (15) month period preceding the date of the next General Election.

WHEREAS: The Acting Secretary of Justice issued an Opinion, on February 12, 1981, in which he points out that according to the provisions of Article 5.006 and 5.007 of the Electoral Law of Puerto Rico, the Governor will convoke all the electors of the geographic demarcation where the Special Election is to be held without establishing any restrictions in the participation of the electors qualified as such.

WHEREAS: The Hon. Carlos Romero Barceló, Governor of Puerto Rico, in harmony with the provisions of the Electoral Law of Puerto Rico, requested appropriate advice from the State Commission of Elections as to the date in which the Special Election is to be held as well as any other technical information of electoral nature related to the same.

WHEREAS: The Special Election to fill the said vacant seat should be held not later than ninety (90) days after the date of its convocation and the person elected in the same will occupy the office until the term of his predecessor expires.

WHEREAS: In an Extraordinary Session held on Friday, February 20, the Commission agreed to set the date of May 24, 1981 for the Special Election of a Representative for District Thirty-One (31).

THEREFORE: I, Carlos Romero Barceló, Governor of Puerto Rico, consistent with the authority bestowed upon me by the Constitution and by the Electoral Law of Puerto Rico, hereby convoke a Special Election in Representative District Number Thirty-One (31), to elect the Representative of the said District, made up of Precinct 86 of Caguas, among all the electors of the geographic demarcation included in precinct 86 of Caguas, on Sunday, May 24, 1981.

In testimony of which, I sign this document and stamp on it the Great Seal of the Commonwealth of Puerto Rico, in the city of San Juan, today, February 26, 1981.

CARLOS ROMERO BARCELO

Published in Accordance with the Law, today, February 26, 1981.

Frances Ríos de Morán
Acting Secretary of State

[EXHIBIT VI]

Newspaper El Mundo
Saturday, July 28, 1979—Page 13A

PROCLAMATION
SUBJECT MATTER:
PRIMARY ELECTIONS FOR REPRESENTATIVE DISTRICT NUMBER FORTY

WHEREAS: On June 21, 1979, a vacancy occurred for the office of District Representative in the House of Representatives of the Commonwealth of Puerto Rico corresponding to Representative District Number Forty (40), due to the resignation of Mr. Alejandro Cruz Ortiz, who was elected to the said office in the General Elections held in Puerto Rico, on November 2, 1976.

WHEREAS: Article 5.006 of the Electoral Law of Puerto Rico, Law Number Four (4) of November 20, 1977 establishes the procedure to follow when a vacancy occurs in the office of a District Senator or Representative nominated by a political party before the fifteen (15) month period preceding the date of the next general elections.

WHEREAS: Consistent with the Electoral Law of Puerto Rico the Governor after consulting with the State Commission of Elections within thirty (30) days after the date in which the vacancy occurred will convoke a special election in the concerned district in order to fill the said vacancy.

WHEREAS: The predecessor to the office of Representative for the Representative District Number Forty (40) appeared in the space provided in the Electoral Ballot of the 1976 General Elections under the New Progressive Party column.

WHEREAS: The special election to fill the vacancy of the said vacant seat should be held not later than ninety days after the date of its convocation and the person elected to the same will occupy the office until the term of his predecessor expires.

THEREFORE: I, Carlos Romero Barceló, Governor of the Commonwealth of Puerto Rico in compliance with the authority bestowed upon me by the Constitution and by the Electoral Law of Puerto Rico, hereby convoke a primary election in Representative District Number Forty (40), comprised by the precincts of San Juan 112 and Guaynabo 113 among the candidates affiliated with the New Progressive Party, on October 14, 1979.

In testimony of which I sign this document and stamp on it the Great Seal of the Commonwealth of Puerto Rico in the City of San Juan, today, July 20, 1979.

Carlos Romero Barcelo

Published according to the Law, today, July 20, 1979.

Frances Ríos de Morán
Acting Secretary of State

[EXHIBIT VII]

COMMONWEALTH OF PUERTO RICO

STATE COMMISSION OF ELECTIONS

Box 2208, San Juan, P.R. 00903

MEMORANDUM

TO: GERINELDO BARRETO PÉREZ, ESQ.
General Administrator
State Commission of Elections

FROM: MIGUEL A. PAGÁN,
Director
Legal Affairs Division

SUBJECT: Persons with a Right to Vote
in a Special Election

In compliance with a request of the Electoral Commissioners of the New Progressive Party and the Popular Democratic Party, Attorneys Eugenio S. Belaval and Héctor Luis Acevedo, the subscriber analyzed, reconsidered his analysis and his initial position about the subject.

After careful analysis, the subscriber respectfully understands that in the Special Elections only those affiliated with the political party to which the Legislator belonged, whose vacancy caused the holding of the special election have the right to vote. I hereby ennumerate the criteria or reasons upon which I uphold my decision in reconsideration:

REASONS:

1. The political history of the political parties of Puerto Rico of no interference in the internal affairs of other political parties demonstrates this.

2. The Law does not stipulate within limits, as to what should be included in the Governor's convocation, does not impose restrictions, or does not state prohibitions as to the effect that only those of the political party may be convoked, but on the contrary, it leaves the door open so that it be limited to a convocation of those of the concerned or corresponding political party. Any behavior not expressly forbidden by law is allowed. This is a general principle of law.

3. Article 5.006 read in its entirety, shows that the legislative intent is that only those affiliated to the party to which the previous incumbent belonged, and whose position is vacant, shall vote. Said Article leaves an open possibility for independent candidacy when the party to which the legislator belonged has not presented a candidate within a period provided by said article.

4. The law cannot seek absurdities and logic tells us that in the said special election only the members of the political party to which the legislator whose vacancy caused the special election belonged will vote, above all, when the political party to which the candidate belonged presented within the term prescribed by the same article candidates affiliated to the said political party.

5. The Governor's Convocation is for a primary election and the people were so informed.

6. The people, the electors, have traditionally called these special elections primaries, and traditionally the electors have interpreted that to mean that in them only those electors affiliated to the

political party to which the legislator, whose vacancy caused the holding of the said special election, belonged could vote. In our democratic system of government the ruling principle is the will of the people. The will of the people could be frustrated if it would be interpreted otherwise.

7. There is an apparent lapse in the wording of Article 5.007 which seems to be contrary to the legislative intent of Article 5.006 of the Electoral Law in force. It would be also contrary to the provisions of Article 1.002 that stipulates as follows:

> "Because of it our Constitutional Law additionally extends to the political parties an expressed recognition and *categorical* rights . . . ." (Emphasis added.)

8. The fact that if the vacancy would occur fifteen (15) months before the holding of a general election demonstrates that then the holding of a special election would not be necessary. If the matter were so crucial, the Legislature would have provided that the said special elections be *always* held.

In compliance with the aforesaid, I recommend that the Project of the Rules and Regulations of Special Elections be amended, in Rule Number One (1), consistent with the said amendment by adding the following phrase at the end of the sentence of the Rule:

> *"And who are affiliated to the Political Party to which the Legislator, whose vacancy caused the holding of the special election, belonged."*

Respectfully submitted, in San Juan, Puerto Rico on October 5, 1979.

[EXHIBIT VIII]

COMMONWEALTH OF PUERTO RICO

STATE COMMISSION OF ELECTIONS

Box 2208, San Juan, P. R. 00903

GERINELDO BARRETO PEREZ, ESQ.
Administrator

October 9, 1979

Hon. Miguel A. Giménez Muñoz
Secretary of Justice
Department of Justice
Box 192
San Juan, Puerto Rico 00902

Dear Mister Secretary:

On October 5, 1979, the Electoral Commission made up of the Electoral Commissioners of the political parties New Progressive Party, Popular Democratic Party and Puerto Rico's Independent Party, attorneys Eugenio S. Belaval, Héctor Luis Acevedo and Luis Rivera Lacourt adopted as an Official Opinion of the Electoral Commission the Memorandum of Miguel A. Pagán, Esq., Legal Adviser of the General Administrator of Elections, dated October 5, 1979, concerning the persons with a right to vote in the special elections, based on Articles 5.006 and 5.007 of the Electoral Law of Puerto Rico in force (Law Number 4 of December 20, 1977, as amended).

The Electoral Commission also recommended in its meeting of October 5, 1979 that we request from the Honorable Secretary of Justice a Legal Opinion concerning the above mentioned subject.

In view of the aforesaid and by this letter, I request a Legal Opinion in relation to the subject already indicated. I include a photocopy of the Memorandum of Attorney Pagán concerning the said issue.

Cordially,

Gerineldo Barreto Pérez, Esq.
General Administrator of Elections

Enclosure

[EXHIBIT IX]

Newspaper El Nuevo Día
August 1, 1979
Page One (1)

TO ALL MEMBERS OF
THE NEW PROGRESSIVE PARTY
WHO RESIDE IN PRECINCTS 112 AND 113

WHEREAS: The Governor of Puerto Rico, Honorable Carlos Romero Barceló has convoked a special election that will be held next Sunday, October 14th in order to fill the vacancy caused by the resignation of the Honorable Representative Alejandro Cruz Ortiz.

WHEREAS: The Electoral Law in Article 5.007 establishes that in the said election all the bona fide electors of the New Progressive Party who reside in Precincts 112 and 113 which comprise Representative District Number Forty (40), will participate.

WHEREAS: We hereby notify any candidate interested in presenting his candidacy for the above mentioned position that he can come to the office of his Political Party from August 1, 1979 till August 24, 1979, from Monday to Friday and from 9:00 a.m. to 4:00 p.m. in order to file the corresponding candidacy.

The forms for the filing of the candidacies, as well as any other additional information will be available in the office of the Political Parties on the aforesaid days and hours.

Rafael Rodríguez Aguayo
General Secretary

(Paid Political Announcement)

[EXHIBIT X]

STATE COMMISSION OF ELECTIONS

ELECTORAL BALLOT [SEAL]

CHOOSE ONLY ONE CANDIDATE

SPECIAL ELECTION OF THE NEW PROGRESSIVE PARTY

To fill the vacant seat of the Representative of District Representative Number Forty (40) in accordance with Article 5.006 of the Electoral Law of Puerto Rico.

October 14, 1979

		Direct Nomination (Write In)
[photo]	[photo]	This column is provided in a blank space so that you may write in it the name of any other candidate that you wish to list as candidate, besides the ones listed in the other spaces provided.
Salomón	**Lydia Díaz Ibarra**	**(Article 4.018)**

[caption omitted]

ANSWER TO THE COMPLAINT

TO THE HONORABLE COURT:

Comes now codefendant, Hon. Carlos Romero Barceló, Governor of Puerto Rico, through the undersigned attorneys and respectfully states, alleges, and prays:

1. The allegations in paragraphs one, two, three, four, nine, ten, and eleven of the Complaint are accepted.

2. The letter sent and enclosed as Exhibit I is the only thing accepted from paragraph five of the Complaint, the rest is denied.

3. In paragraph six of the Complaint it is accepted that the Hon. Acting Secretary of Justice on February 12, 1981 issued the Opinion attached as Exhibit II of the Complaint. The contents of the Opinion, attached as Exhibit II, speaks by itself, hence plaintiff's conclusion or appreciation of the Exhibit requires no further allegations.

4. We deny paragraph seven of the Complaint since it does not agree with the content of the letter dated February 17, 1981, attached as Exhibit III. The authenticity of said Exhibit III is accepted.

5. Paragraph eight of the Complaint is accepted, making it clear that Exhibit IV attached speaks by itself and we refer ourselves to it.

6. We deny the allegations made in paragraphs twelve, seventeen, and eighteen of the Complaint.

7. Paragraph thirteen is accepted but making it clear that the Opinion of Attorney Miguel A. Pagán was subject to the Opinion of the Secretary of Justice, which the Commonwealth Election Commission requested. It is also alleged that the above-mentioned Opinion of Attorney Miguel A. Pagán, does not create or establish any right with regard to the letter of the law or the legislative intent.

8. Paragraph fourteen of the Complaint is denied and we refer to Exhibit VIII attached, whose authenticity is accepted. The last allegation contained in this paragraph is denied as it is drafted.

9. Paragraph fifteen of the Complaint is accepted, making it clear that said by-election was not held because, among other reasons, it was academic.

10. Paragraph sixteen of the Complaint is accepted, making it clear that said by-election was not held because among other reasons, it was academic, and there was no need to use the material mentioned.

SPECIAL AND/OR AFFIRMATIVE DEFENSES

1. The Electoral Review Board, organism created by a special law to settle and adjudge any electoral matter, has primary jurisdiction in the above-captioned case.

2. The Legislature has ample power, as granted by our Constitution, to regulate all proceedings regarding the method to fill a vacancy of a district Representative. Article 5.006 of the Puerto Rico Electoral Law provides for said method, therefore it is of strict application and should be followed. Plaintiff through his action intends to change the proceeding established by law, which act would be null and void.

3. The forced interpretation which plaintiff intends to give to the provisions of art. 5.006, *supra,* is, not only

contrary to the letter and spirit of the law, but it also, violates the constitutional rights of the voters in the electoral district in question, as well as those of any other independent candidate who chose to compete in a free, voluntary, and democratic manner, since it deprives them of said constitutional right.

4. The law, as well as its spirit and legislative intent and the Opinion of the Secretary of Justice on this particular, uphold the constitutionality of the provision of law under discussion, contrary to the interpretation given by plaintiff. It is to this effect that the Courts should adopt that interpretation which upholds the constitutionality of the law, avoiding discrimination, and rejecting any possible interpretation leading to the absurd and choosing the most rational from the point of view of the purpose of the law.

5. The interpretation made by plaintiff of the provisions of law in this case, and its request to this Hon. Court to issue an order prohibiting the participation of voters and independent candidates who qualify for the electoral process but are not affiliated to the Popular Democratic Party, violates the most elemental principles of universal suffrage and of a just, free, and democratic electoral process.

6. Plaintiff's interpretation of the law in question and the request made to this Hon. Court is also unconstitutional since it places the citizens' electoral rights in a position way below and subordinated to the rights which political parties or groups may have. Under our system of government the electoral rights of the citizen prevail over the rights and prerogatives of political groups and parties.

7. Plaintiff, who has not claimed any irreparable damages in the Complaint, shall not suffer any if its petition is denied. On the contrary, the damages suffered by electors and independent candidates, if they were

deprived of their right to vote freely and voluntarily, which is essential to any democratic society, would be of an irreparable character and in violation to the Constitution of the Commonwealth of Puerto Rico and the Constitution of the United States. For the foregoing reason, the injunction requested does not lie.

WHEREFORE, we respectfully pray from this Hon. Court to dismiss the above-captioned Complaint, issuing any other pronouncement which it deems pertinent at law.

I CERTIFY: That on this same day I have sent a true and exact copy of this Answer To Attorney Guillermo Mojica Maldonado, Box 5782, San Juan, Puerto Rico 00906.

In San Juan, Puerto Rico, this 6th day of March 1981.

RALPH T. SKELLY
Acting Secretary of Justice

HECTOR URGELL CUEBAS
70 Mayaguez St., Off. 2-B
Hato Rey, Puerto Rico 00917
Tel. 751-4941

By: HECTOR URGELL CUEBAS
Hector Urgell Cuebas

[caption omitted]

ANSWER TO THE COMPLAINT

TO THE HONORABLE COURT:

Comes now defendant attorney Gerineldo Barreto Pérez, General Administrator of Elections only and exclusively in his capacity as public official without submitting to the jurisdiction and making a special reserve of the rights which may be raised and adjudged before the pertinent forum of the Federal Courts of the United States of America, through the undersigned Attorneys who respectfully allege, state and pray:

1. The allegations in paragraphs 1, 2, 3, 4, 8, 9, 10, 11, and 15 are accepted.

2. The allegations in paragraph 12 are denied.

3. With regard to paragraph 5, the delivering of the letter dated February 11, 1981 to the Governor is accepted but the rest of the allegation is denied.

4. Allegation number 6 does not require an answer. The Opinion of February 12, 1981 is attached as Exhibit II of the Complaint.

5. With regard to the allegation in paragraph 7, it is accepted that on February 17, 1981, the Hon. Governor of Puerto Rico, Carlos Romero Barceló, requested the Commonwealth Election Commission to recommend him a date to hold the By-election, but the rest of said allegation is denied.

6. With regard to the allegation of paragraph 14 it is accepted that the Letter (Exhibit VIII) was sent, but the rest of the allegation is denied and we make reference to the specific text of said letter.

With regard to the last sentence of paragraph 14, it should be made clear that the Secretary of Justice did not issue any Opinion on the matter consulted and that it is on February 12, 1981 that the Secretary of Justice issues an Opinion on that particular matter.

7. The allegation in paragraph 16 is accepted but making it clear that said By-election was never held.

8. The allegations in paragraphs 17 and 18 are allegations of law which do not require a responsive allegation, therefore, they are denied.

9. The allegation in paragraph 12 is denied.

10. With regard to the allegation in paragraph 13 it is accepted that the Commission adopted an Opinion which was issued by the undersigned but it should be clear that this was subject to the Opinion requested by the Commission from the Secretary of Justice. See the letter of attorney Gerineldo Barreto Pérez, to the Hon. Secretary of Justice dated October 9, 1979, included as Exhibit VIII of the Complaint.

AFFIRMATIVE DEFENSES

1. The General Administrator of Elections has always complied, in good faith, with the Laws in Force regarding this particular and with the Opinions of the Commonwealth Election Commission and of the Secretary of Justice.

2. The Opinions of the Hon. Secretary of Justice are mandatory for the General Administrator of Elections as Head of the Agency.

WHEREFORE, we respectfully pray this Hon. Court to dismiss the Complaint in the above-captioned case, to sustain this Answer and the Affirmative Defenses, and issues any other pronouncement which deems pertinent at law.[1]

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 4th day of March 1981.

NOTICE

I CERTIFY: That I have sent a true and exact copy of this Answer to Attorney Guillermo Mojica Maldonado, Box 5782, San Juan, Puerto Rico 00906, and Attorney Héctor Urgell Cuebas, 70 Mayaguez St., Hato Rey, Puerto Rico 00917.

---

[1] Defendant makes reserve and retains the right to raise the constitutional questions raised in this appeal, under the protection of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States and any other federal statute, and reserves the same for the federal forum following the doctrine in *England* v. *Board Examiners,* 375 U.S. 411.

In San Juan, Puerto Rico, this 4th day of March 1981.

By ATTORNEY MIGUEL A. PAGAN
Attorney Miguel A. Pagan

ATTORNEY EUNICE SEIN LLOMPART

By ATTORNEY JOSE A. CARLO
Attorney Jose A. Carlo

Attorneys for the General
Administrator of Elections
Commonwealth Election Commission
Box 2208
San Juan, Puerto Rico 00903
Tel. 724-4979 (Ext. 216 and 217)

[caption omitted]

PETITION TO INTERVENE

TO THE HONORABLE COURT:

Come now the intervenors through their undersigned attorneys who respectfully state:

1. The intervenors, each and everyone of them, reside within and are duly registered electors of Representative District No. 31. None of them is a member of the Popular Democratic Party.

2. According to Articles 5.006 and 5.007 of the Electoral Law, the intervenors have the right to vote in the by-election to be held on May 24 to fill the vacancy in the office of House Representative for District No. 31.

3. The right to vote which intervenors have may be injured by the final decision of this action as stated in the prayer of the complaint where a petition is made for:

> (a) a judicial determination to the effect that in the by-election mentioned only candidates and electors affiliated to the Popular Democratic Party participate, and
>
> (b) an injunction prohibiting any candidate or elector which is not a member of the Popular Democratic Party, from participating in said by-election.

4. A decision or injunction as requested by plaintiff, would not only injure the intervenors' rights granted by

the Puerto Rico Electoral Law, but would also injure those constitutional rights of intervenors granted by the second and seventh articles of the Bill of Rights of the Constitution of the Commonwealth of Puerto Rico and those under the Fifth and Fourteenth Amendments to the Constitution of the United States.

5. Once it is made clear that we are dealing with a by-election and not with a primary, the Electoral Law may not give the Governor the power to offer the right to vote to only a group defined by a party as it is intended by plaintiff, without violating the principles of the Bill of Rights of the above-mentioned Constitutions.

6. On a recent occasion, the Supreme Court of Puerto Rico acknowledged the fundamental and preeminent condition of the right to vote when it cited approvingly the ruling of the U.S. Supreme Court in *Reynolds* v. *Sims,* 377 U.S. 533 (1964): "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, *and any restrictions on that right* strike at the heart of representative government." (Emphasis added.) See *Ortiz Anglerò* v. *Barreto Pérez,* opinion of the Supreme Court of Puerto Rico of June 24, 1980, Ref. Bar. Asso. 80-66.

7. Since we are dealing with a by-election to fill a vacancy for the office of Representative for the District in which the intervenors reside, and are registered electors with a right to vote, *any restrictions on that right* would result in a fundamental violation of their constitutional rights as described in this petition.

WHEREFORE, intervenors respectfully pray the Court to dismiss the complaint and review the procedure informed by defendants to hold the by-election object of this action, and issue any other order necessary for the protection of intervenors' rights.

In San Juan, Puerto Rico, this 6th day of March 1981.

CORDOVA, SUBIRA, GAZTAMBIDE
& ARRILLAGA
Attorneys for Intervenors
G.P.O. Box 3565
San Juan, Puerto Rico 00936

I CERTIFY: That I sent by mail a true and exact copy of this petition to plaintiff's attorney, Guillermo Mojica Maldonado, Box 5782, San Juan, Puerto Rico 00906; to the Secretary of Justice, attorney for the Governor of Puerto Rico, Department of Justice, 50 Fortaleza St., San Juan, Puerto Rico, and to the General Administrator of Elections, Commonwealth Election Commission, 114 San Agustín St., San Juan, Puerto Rico, this 6th day of March 1981.

By: JORGE L. CORDOVA, JR.
Jorge L. Cordova, Jr.

COMMONWEALTH OF PUERTO RICO
STATE COMMISSION OF ELECTIONS

CERTIFICATION

I, Ramón Ruiz Roche, Secretary of the State Commission of Elections, hereby Certify:

That in accordance with the records and documents on file at the State Commission of Elections with reference to the vacancy in Representative District Number 40 which occurred in the year 1979, the following is shown:

A. The Election set forth forth October 14, 1979 did not take place due to the fact the same became academic as a result of the fact that Mr. Salomón Rondón Tolléns was the only candidate who complied with all the legal requirements to occupy the office. In addition to Mr. Rondón Tolléns, two other members of the New Progressive Party were interested in that position. Mr. David Cardona Molina withdrew his candidacy and Mrs. Lydia Díaz Ibarra did not comply with the necessary requirements. Mr. Salomón Rondón Tolléns was certified by the Commission on October 8, 1979 as representative for the Representative District Number 40 without the need for holding election.

B. The only person who filed an application to participate in the election for Representative District Number 40 were those three (3) members of the New Progressive Party mentioned in the preceding paragraph. No other political party or independent candidate sought to participate in said event.

I issue these presents upon request of Héctor Urgell Cuebas, Esq., Legal Counsel to the Governor, dated March 4, 1981.

San Juan, Puerto Rico, March 6, 1981.

By: RAMÓN RUIZ ROCHE

Seal of the
State Commission of
Elections

Ramón Ruiz Roche
Secretary and
Acting General Administrator

COMMONWEALTH OF PUERTO RICO
COMMONWEALTH ELECTION COMMISSION

CERTIFICATE

I, Ramón Ruiz Roche, Commonwealth Election Secretary, DO HEREBY CERTIFY:

That pursuant to the certificate prepared by Mr. Carlos Colón Berríos, Director of the Commonwealth Election Commission's Internal Auditing Office, the result of the General Election held on November 2, 1976 for Representative District No. 40 and of November 4, 1980 for the office of Representative for Representative District No. 31, is as follows:

Representative District No. 31

November 4, 1980

Party	Candidate	Straight	Split	Total
PDP	Ramón Muñiz	16,957	2,234	19,191
NPP	Erick Hernández	17,263	1,282	18,545
PIP	Adelino Márquez Borges	1,414	1,039	2,453
PSP	Carmen A. Fonseca Acevedo	105	30	135

Representative District No. 40

November 2, 1976

Party	Candidate		San Juan 112	Guaynabo 113	Total
PDP	Ernesto Cabrera	Straight	6,190	8,295	14,485
		Split	169	348	517
			6,359	8,643	15,002
NPP	Alejandro (JR) Cruz	Straight	7,593	10,520	18,113
		Split	215	278	493
			7,808	10,798	18,606

The report signed by Mr. Carlos Colón Berríos is attached to and made part of this certificate.

These presents is issued at the request of Mr. Héctor Urgell Cuebas, Legal Advisor of the Governor, on March 5, 1981.

In San Juan, Puerto Rico, this 6th day of March 1981.

By: RAMÓN RUIZ ROCHE

Ramón Ruiz Roche
Acting Administrator and Secretary

REFERENCE PAGE

The following opinion and judgment has been omitted in printing this appendix because it appears in the appendices to the printed Jurisdictional Statement as indicated:

Opinion and Judgment of the Superior Court	Jurisdictional Statement Appendix A

[Appendix to brief of Respondants—Appellees before Supreme Court]

COMMONWEALTH OF PUERTO RICO

COMMONWEALTH ELECTION COMMISSION

Box 2208, San Juan, P. R. 00903

ATTORNEY ALBERTO GUERRERO
Under-Secretary

March 25, 1981

MEMORANDUM:

TO: ATTORNEY HÉCTOR LUIS ACEVEDO
PDP Electoral Commissioner

FROM: ALBERTO GUERRERO

MATTER: Filing of Candidates for the 1981 Primaries

Today March 25, 1981 the following persons have filed their petitions to be considered as candidates for representative of District No. 31, electoral precinct No. 86 of Caguas:

NAME	TIME AND DATE
POPULAR DEMOCRATIC PARTY	
1. Luis A. Pereira Buonomo	March 2, 1981 (11:52 a.m.)
2. Juan Corujo Collazo	March 2, 1981 (11:53 a.m.)
3. Joaquín (Papo) Rivera Ortiz	March 2, 1981 (11:54 a.m.)
4. Moisés Muñiz Hernández	March 2, 1981 (11:56 a.m.)

INDEPENDENT CANDIDATE

1.	Miguel Hernández Rodríguez	March 20, 1981 (2:57 p.m.)

REFERENCE PAGE

The following opinions and judgment have been omitted in printing this appendix because they appear in the appendices to the printed Jurisdictional Statement as indicated:

Opinions of the Supreme Court of Puerto Rico	Jurisdictional Statement Appendix B
Judgment of the Supreme Court of Puerto Rico	Jurisdictional Statement Appendix C

Motion to Dismiss or Affirm

Office-Supreme Court, U
FILED
SEP 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JESUS RIVERA RODRIGUEZ, *et al.*,

Appellants,

v.

POPULAR DEMOCRATIC PARTY, *et al.*,

Appellees.

On Appeal From The Supreme Court Of Puerto Rico

MOTION TO DISMISS FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION

RAFAEL HERNANDEZ COLON*
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Attorneys for Appellees

Of Counsel:
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*Counsel of Record

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

The real issue in this case is whether the Federal Constituion requires the Commonwealth of Puerto Rico or a State to hold a special election to fill a vacant elective office. This issue should be discussed within the context of a legislative scheme that gives to a political party the right to preserve a legislative seat when a vacancy occurs.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT	1
I. No Fundamental Right is Abridge by Puerto Rico's Statutory Scheme	3
A. Appointment procedures for filling vacancies in state elective offices is a traditional and accepted procedure in American Law	3
B. Equal protection and right to vote doctrines developed by this Honorable Court are not applicable to vacancy-filling procedures	9
C. The placement by Section 5.006 of the appointive power in the Party of the deceased legislator does not offend the equal protection of the laws	13
D. Minimum scrutiny should be applied to a statutory scheme providing for a method of filling legislative vacancies different from an open special election	16
E. The statute under attack clearly satisfies even the standard of strict scrutiny	17
II. A Reversal in this case would cause a serious disruption in both Puerto Rican and American governmental structures	24
CONCLUSION	26

APPENDICES

Appendix A: District No. 31 electorial results

TABLE OF AUTHORITIES

CASES: Page

Avery v. *Midland County*, 390 US 474 (1968) 9, 19

Branti v. *Finkel*, 100 S Ct. 1287, 1294 (1980) 1, 15

Brenan v. *Haines*, 455 F. 2d. 943 (3rd. Cir. 1972) 7, 8, 17, 25

Bullock v. *Carter*, 405 US 134, 144 (1972) 16

Carrington v. *Rash*, 380 US 89 (1965) 9

Calero Toledo v. *Pearson Yacht Leasing Co.*, 416 US 663 (1974) 19

Cordova and Simonpietri Ins. Agency v. *Manhattan Bank*, 649 F. 2d 36 (1981) 19, 20

Cipriano v. *City of Hourna*, 395 US 701 (1968) 9

Dunn v. *Blumstein*, 405 US 330 (1972) 9, 16

Elrod v. *Burns*, 427 US 347, 367 (1876) 1, 15

Farley v. *Farley*, 481 F. 2d. 1009 (3rd. Cir.) (1973) ... 8, 9, 25

Fornaris v. *Ridge Tool Co.*, 400 US 41 (1970) 17, 18

Forston v. *Morris*, 385 US 231, 250 (Fortas, J., dissenting) 16, 19

Fuster v. *Buso*, 102 D.P.R. 327 (1973) 21

Garcia Passalacqua v. *Popular Democratic Party*, Petition of Certiorari No. 81-434 20

Gray v. *Sanders*, 372 US 368, 379 (1963) 9

Gordon v. *Lance*, 403 US 1, 5 (1971) 16

Hadley v. *Junior College District*, 397 US 50 (1970) 9, 19

Harper v. *Virginia Board of Election*, 383 US 663 (1966) . 10

Hill v. *Stone*, 421 US 289 (1975) 16

Jackson v. *Ogilvie*, 426 F. 2d. 1333 (7th Cir.) *Cert. denied*, 400 US 833 (1970) 3, 4

Jenness v. *Forston*, 403 US 431, 438 (1971) 10

Kaelin v. *Warden*, 344 F. Supp. 598 (E.D. Pa. 1971) .... *passim*

Kramer v. *Union Free School District*, 395 US 621 (1969) 9, 10, 12, 16

Liquilux Gas Services of Ponce, Inc. v. *Tropical Gas Co.*, 303 F. Supp. 414, 418 (1969) 20

Table of Authorities Continued

Page

McDonald v. *Board of Election Commissioners of Chicago*, 394 US 802, 809 (1969) 16, 19

Mora v. *Mejias*, 206 F. 2d 377 (1953) 19

National League of Cities v. *Usery*, 426 US 833 (1976) ... 19

New York Times v. *Sullivan*, 376 US 254, 270 (1964) 17

Osvaldo Molina v. *Popular Democratic Party*, Petition of Certiorari, No. 81-434 24

Parker v. *Nobles*, 496 S.W. 2d. 921 (Texas) (1973) .. 8, 18, 25

Patterson v. *Burns*, 327 F. Supp. 745 (D. Hawaii 1971) ..... *passim*

Reynolds v. *Sims*, 377 US 533 (1964) 9, 10, 12

Rosario v. *Rockefeller*, 410 US 752 (1973) 16

Sailors v. *Board of Education*, 387 US 105, 110-111 (1967) 19

State ex rel Lanier v. *Hall*, 23 NW 2d 44 (1946) 3

Storer v. *Brown*, 415 US 724, 736 (1974) 18

Todd v. *Johnson*, 36 S.W. 987 (1896) 3

Valenti v. *Rockefeller*, 292 F. Supp. 851, 883 (SD NY 1968); 393 US 405 (1969) ..... *passim*

Williams v. *Rhodes*, 393 US 23 (1968) ..... *passim*

Wilson v. *Oklahoma City Council*, 347 F. Supp. 306 (W.D. Okl. 1972) 4, 25

STATUTES:

Electoral Law of Puerto Rico

16 LPRA 3003 1

16 LPRA 3154 20

16 LPRA 3156 20

16 LPRA 3206 1

16 LPRA 3207 1

Municipal Law of Puerto Rico

21 LPRA 3101 & 3103 25

21 LPRA 3057 (c) 25

Table of Authorities Continued

Page

Puerto Rico Constitution

Art. III Section 3 20

Art. III Section 8 21

Art. IV Section 7 25

MISCELLANEOUS:

L. Tribe, American Constitutional Law (1978), p. 740 ..... 10, 18

63 Am. Jur. 2. Public Officers & Employees, S. 128 (1972) 3

Appellee Popular Democratic Party respectfully requests the dismissal of the appeal for its failure to present a substantial federal question.

STATEMENT

Mr. Ramon Muniz, the Popular Democratic Party candidate for Representative District No. 31, was elected to office in the general election held on November 4, 1980. On January 28, 1981, only weeks after being sworn in for a four years term, Mr. Muniz died.

District No. 31 was wholly won by the PDP[1]. Its candidates for Governor, Resident Commissioner, at Large and District Senators and Representatives, Mayor and City Assemblymen received more votes than those nominated by the New Progressive Party, the party to which Governor Carlos Romero Barcelo belongs.[2] On this basis, and especially under the letter and spirit of Articles 5.006 and 5.007 of the Electoral Law of Puerto Rico, 16 LPRA 3206-3207, the PDP claimed its right to fill the vacancy with a District No. 31 resident affiliated to the PDP.

---

[1] Although it is irrelevant to the substantive issue, the appellants assertion that Mr. Muniz's election was the result of mixed ballots is misleading. See J.S. at 3.

A mixed ballot (split) according to Article 1.003 of the Electoral Law of Puerto Rico, 16 LPRA 3003, is one in which more than one mark appears. It might be mixed even though the voter only supports candidates from one party. A straight ballot, on the other hand, is one with only a mark under a party's emblem. When this occurs the voters are supporting all party candidates. It is important to observe that the PDP had more ballots under its emblem than the NPP and that all PDP candidates won over the NPP candidates. See Appendix A. We insist, however, that it is irrelevant whether Mr. Muniz votes came from PDP members, other parties' affiliates or independent voters since a voter who supports a party's candidates is not likely to ignore his adherence to a particular platform and political program. See *Elrod* v. *Burns*, 427 U.S. 347, 367 (1976); *Branti* v. *Finkel*, 100 S. Ct. 1287, 1294 (1980).

[2] See Appendix A.

Surprisingly, the Governor called a special election to fill a vacancy in which non PDP members could challenge PDP affiliates and all District No. 31 voters could participate. The PDP challenged the Governor's new statutory construction of Articles 5.006 and 5.007. The Supreme Court of Puerto Rico held that Article 5.006 gives to the political party affected by a vacancy in a legislative district the opportunity of submitting a candidate to fill it. If more than one candidate is nominated by the political party, Article 5.007 requires a special election in which all qualified district residents could vote. See J.S. Appellants' Appendix C, at 1c-2c.[3] The Court also ruled that such method is fully consistent with applicable guarantees of both the United States and Commonwealth Constitutions since the statutory scheme satisfies even the most rigid formula of judicial review. See J.S. Appellants' Appendix B, at 13b-14b. According to the Court, the Commonwealth's interests to protect the legislative balance, the stability of governmental structures and the electoral mandate of the previous election, as well as its objective to reduce interpartisan campaigns to one every four years, are of compelling nature. See Appellants' Appendix B, page 14b.[4]

---

[3] On July 20, 1979, Governor Romero Barcelo, who is also President of the NPP, called for a primary election between candidates and voters affiliated to the NPP to fill a vacancy in District No. 4. That seat was occupied by a representative nominated by the NPP. The Puerto Rico Elections Commission agreed with the Governor upon the point that the proper construction of Articles 5.006 and 5.007 of the Electoral Law only permits the participation of candidates and voters affiliated with the party that nominated the originally elected representative. See J.S. Appellant's Appendix B at 6b-12b.

[4] This Court refused to issue a stay against the Puerto Rico Supreme Court mandate.

I

NO FUNDAMENTAL RIGHT IS ABRIDGED BY PUERTO RICO'S STATUTORY SCHEME

A. Appointment procedures for filling vacancies in state elective offices is a traditional and accepted procedure in American Law.

Appellants make an attempt to establish that lower federal and state courts have held that special elections to fill vacancies in state elective offices is a procedure mandated by the Federal constitution. This effort by appellants is spurious and obviously unfruitful. The only authorities cited by appellants are a quotation from 63 Am. Jur. 2d *Public Officers & Employees*, Sec. 128 (1972) with no attempt to discuss the cases which allegedly sustain the quotation;[5] a quotation from a *dissenting opinion* of Judge Frankel in *Valenti* v. *Rockefeller*, 292 F. Supp. 851, 883 (SD NY 1968), a case affirmed Per Curiam by this Court at 393 US 405 (1969); and a quotation from the obviously inapposite case of *Jackson* v. *Ogilvie*, 426 F. 2d 1333 (7th Cir.) *Cert. denied*, 400 US 833 (1970) which dealt with vacancies in the United States House of Representatives where the Constitution specifically requires a special election.[6]

---

[5] The cases which purportedly sustain the quotation used by appellants at J.S., page 7, are *Patterson* v. *Burns*, 327 F. Supp. 745 (1971) discussed infra, *State ex rel Lanier* v. *Hall*, 23 NW 2d 44 (1946), and *Todd* v. *Johnson* 36 S.W. 987 (1896). Both *Hall* and *Johnson* dealt with the interpretation of provisions that required vacancies filled by special elections and provide no support whatsoever for the proposition that the filling of vacancies for state elective offices by appointment is constitutionally impermissible. Indeed, if 63 Am. Jur. 2d Section 128 is an appropriate authority, the first sentence of the Section should be dispositive: "The fact that an office is an elective one does not, in the absence of some provision of the law to the contrary, prevent the filling of a vacancy therein by appointment."

[6] *Jackson* v. *Ogilvie*, *supra*, concerned a vacancy in the sixth congressional district of Illinois and the effect of Article I Section 2 Clause 4 of the Federal Constitution. The Court framed the issue of the case in the following words:

> "The issue at the heart of the instant case is whether the constitutional provision [Article I Section 2 Clause 4] that when vacancies happen [in

The real picture is very different. Every time Federal and State courts have had occasion to face the issue of the constitutionality of appointment procedures for state elective offices they have consistently upheld the validity of such procedures, and in most cases have declared that the issue fails to raise a substantial federal question.[7] Indeed, the Courts have given extensive recognition to the appointment process as a traditional and accepted practice in American Law. In *Wilson* v. *Oklahoma City Council*, 347 F. Supp. 306 (W.D. Okl. 1972) the provisions of the municipal law of Oklahoma City which authorize and direct the filling of a vacancy on the city council by appointment of the council, with service until the next general municipal election, was challenged as violative of the Federal Constitution. The Court held that the procedures for filling vacancies was the type of legislative decision "reserved for the states" and that plaintiffs had failed "to raise a substantial federal question." 347 F. Supp., at 308. With regard to the appointment procedures in general, the Court said:

> "No authority has been presented to the Court or found which declares unconstitutional any state law which directs the filling of a vacancy in public office by appointment rather than by an immediate election. Moreover, historically such appointive procedures in event of vacancies in public office has been universally followed in England and in the States of this country both before and after the adoption of the Fourteenth Amendment to the United States Constitution without Constitutional objection." 347 F. Supp., at 308.

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the U.S. House of Representatives] the Executive Authority of the state 'shall issue Writs of Election to fill such Vacancies' is mandatory."

Obviously, *Jackson* v. *Ogilvie* can have no relation whatsoever to the question of whether the Federal Constitution mandates that vacancies in state elective offices be filled through special elections.

[7] As the Supreme Court of Puerto Rico said in the Judgment appealed from: "The Constitution of the United States does not require either a fixed method for filling vacancies." J.S. App., p. 146, n. 5.

In *Kaelin* v. *Warden*, 334 F. Supp. 598 (E.D. Pa. 1971), plaintiffs attacked the constitutionality of a state statute which provided that any "vacancy in the office of county commissioners shall be filled, for the balance of the unexpired term, by the court of common pleas of the county in which such vacancy shall occur by the appointment of a registered elector of the county who was a member of the same political party as the commissioner whose place is to be filled at the time the commissioner was elected." 334 F. Supp., at 604. The Court rejected the claim that this statutory scheme for the filling of interim vacancies deprived plaintiffs of their rights under the Guaranty Clause, and the Due Process and Equal Protection Clause of the Fourteenth Amendment. On this point the court stated:

> "In this case we are presented with the question of whether one member of a three member elected board can be appointed in order to fill a casual vacancy. The use of an appointive process as a means to fill an interim vacancy is not foreign to our traditional notions of representative government." 334 F. Supp., at 606.[8]

In *Patterson* v. *Burns*, 327 F. Supp. 745 (D. Hawaii 1971), Article III, Section 6 of the Hawaii Constitution which provides for the filling of a vacancy in the state legislature through "appointment by the governor for the unexpired term," 327 F. Supp., at 747, was alleged to violate the right to vote and the equal protection of the laws guaranteed by the Fourteenth Amendment. The claim that appointment was a constitutionally impermissible method to provide for filling of

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[8] In attempting to distinguish *Kaelin* v. *Warden*, supra, appellants entirely misconceive the nature and implications of the decision. J.S. p. 16, n. 5. The Court unreservedly approved the appointment process for vacancy replacement as consistent with our constitutional structure. As to the requirement that the position be filled by an elector "who was a member of the same political party as the Commissioner whose place is to be filled" see our discussion infra.

vacancies in state legislatures was flatly rejected by the Court. The Court said:

> "Appointment to fill a legislative vacancy is a well-recognized practice in American Law. It is a reasonable and necessary procedure to cope with an emergency situation and as such, is well within the constitutional boundary of the states power to regulate elections." 327 F. Supp., at 752.

After upholding the validity of the appointment process the court declared unconstitutional Hawaii's particular statutory scheme. The law, including constitutional and statutory provisions, provided for filling a vacancy under certain circumstances until next general elections, while in other circumstances, where in fact there was more time to arrange the filling of the vacancy at the next general election, the statutes provided "for a longer term of gubernatorial appointment with no provision for election by the people at the next general election." 327 F. Supp. at 745. The Court found this constitutional and statutory structure to be wholly irrational. But this holding was only a rejection of Hawaii's irrational ordering of its vacancy procedures. In no way it constituted a rejection of the appointment procedure *per se*. The Court itself felt obliged to clarify this point:

> "Our holding in this regard is in no way inconsistent with our holding that the denial of equal protection due to 'malappointment' was not of constitutional significance . . . Legally satisfied with the constitutionality of the state's vacancy-filling scheme, we evaluated the effective dilution of the vote in the Fourth District with respect to all other voters in the state and found that dilution to be more theoretical than real. We deal here with an entirely different classification and with entirely different standards of evaluation." 327 F. Supp., at 753.

Indeed, the inapplicability of this holding of irrationality to the appointment process in general is so clear that the Court *refused to order a special election* and merely deferred to the State Legislature to adopt a solution, expressly suggesting the

alternative of "gubernatorial appointment until next general election." 327 F. Supp., at 755.[9]

In *Brennan* v. *Haines*, 455 F. 2d. 943 (3rd Cir 1972), The United States Court of Appeals for the Third Circuit sustained against constitutional attack, Pennsylvania's statutory procedures for filling vacancies in first-class township boards. Under the statute, a vacancy in the 15 member Board of Commissioners of Abington Township, was filled by appointment by the remaining fourteen board members. Citing *Kaelin* v. *Warden*, supra, the Court noted that "it is fairly well established that the right of a specific electorate to vote for state government officials does not of itself establish in that same electorate the right to fill those positions in the event of interim vacancies" 455 F. 2d., at 945. The Court held that although the statutory procedures denied "the citizens of the ward faced with a vacancy any role in the selection of a replacement representative" such deprivation did not reach "federal constitutional proportions." 455 F. 2d., at 945.

The case of *Valenti* v. *Rockefeller*, 292 F. Supp. 851 (SDNY 1968), aff'd per curiam, 393 U.S. 405 (1969), is specially instructive. The Seventeenth Amendment to the Federal constitution provides that:

> "When vacancies happen in the representation of any State in the Senate, the executive authority of such state *shall issue writs of election to fill such vacancies:* Provided that the legislature of any state may empower the executive thereof to make temporary appointments until the people full the vacancies by election as the legislature may direct." (Our emphasis).

At issue in *Valenti* was Section 296 of New York Election Law which provides that when the vacancy arises less than 60 days prior to New York's spring primary in an even-numbered year the vacancy will be filled at the general election in the next even-numbered year. This provision meant that the vacancy created by the death of Senator Robert F. Kennedy

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[9] See Appellants' misinterpretation of *Patterson* v. *Burns* in their Jurisdictional Statement, at page 12.

on June 6, 1968 would be filled in November 1970, more than 29 months later. During that time the appointee of the Governor will serve as Senator for New York.

Plaintiffs, all qualified electors of New York, alleged that Section 296 infringed their right to popular representation and violated the vacancy provisions of the Seventeenth Amendment. The Court held that Section 296 was a permissible exercise by the State of the discretion conferred by the Seventeenth Amendment, for the purpose of accommodating the requirements of the amendment with its own electoral processes. The delay of 29 months between the Senate vacancy and the election of a replacement was upheld even in the face of the amendments requirement that the executive authority of the state "shall issue writs of election to fill such vacancies." Thus, the specific constitutional requirement that Senate vacancies be filled by election is not offended by a "temporary" appointment of almost two and a half years.

The discretion enjoyed by the states under the Seventeenth Amendment for United States Senate vacancies recognized in *Valenti* cannot be nearly as ample and far-reaching as the discretion they enjoy for regulating vacancy-filling procedures for *state* elective offices. As demonstrated above that discretion has been consistently recognized by the lower federal and state courts. The appointment procedure has been declared to be a "well recognized practice in American law" [10] and consistent with our "traditional notions of representative government." *Patterson* v. *Burns*, supra; *Kaelin* v. *Warden*, supra. Thus, the courts have held the decision to use such procedures "well within the boundary of the states power to regulate elections," and deprivation thereof has been declared not to reach "federal constitutional proportions." [11] *Patterson* v. *Burns*, supra; *Brennan* v. *Haines*, supra. [12]

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[10] In addition to the appointment provision of the Seventeenth Amendment, it should be noted that the Twenty-Fifth Amendment provides for an appointment when the vice presidency is vacant.

[11] See also *Parker* v. *Nobles*, 496 S.W. 2d 921 (Texas 1973).

[12] Appellants cite *Farley* v. *Farley* 481 F. 2d. 1009, (3d Cir. (1973) as "holding that the issues raised in *Kaelin* as well as related issues continue to

B. Equal protection and right to vote doctrines developed by this Honorable Court are not applicable to vacancy-filling procedures

In a series of decisions, starting with the important case of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this Honorable Court has developed the equal protection requirements for state legislative apportionment. The Court has insisted that "equal numbers of voters should elect equal number of representatives." Tribe *American Constitutional Law* (1978), p. 740. "An individuals right to vote for State legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the state." 377 U.S., at 568. The famous phrase "one person, one vote"[13] has succinctly expressed the basic egalitarian requirement that state legislative representation must be closely based on population. The Court later applied these principles to a variety of local government bodies. See, e.g., *Avery* v. *Midland County*, 390 U.S. 474 (1968); *Hadley* v. *Junior College District*, 397 U.S. 50 (1970).

A second line of cases has proscribed certain restrictions of the franchise. In *Kramer* v. *Union Free School District* 395 U.S. 621 (1969) the Court held that a state could not, consistent with the equal protection clause, limit the franchise in school board elections to those individuals who owned or leased taxable real property in the district. See also *Cipriano* v. *City of Hourna* 395 U.S. 701 (1968). A durational residency requirement for elegibility to exercise the right to vote was held unconstitutional in *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). In *Carrington* v. *Rash*, 380 U.S. 89 (1965), a law denying the

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present a substantial federal question." J.S. p. 16, n. 5. But the issue held to present a substantial federal question in *Farley* was the constitutionality of a California statute which allowed each voter to vote for only two candidates for the three offices of County Commissioners. No vacancy provision was involved there. Indeed, the Court held that *Kaelin* v. *Warden* did not foreclose the issue of substantiality in *Farley* precisely because *Kaelin* "really only related to the vacancy provision of the statute . . ." 481 F. 2d. at 1012.

[13] See *Gray* v. *Sanders*, 372 US 368, 379 (concurring J. Stewart) (1963); *Mahan* v. *Howell* 410 US 315, 319 (1973).

franchise on the basis of the citizens military status was invalidated. The Court has also held unconstitutional the requirement of poll taxes for voters in state elections, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966), and Ohio's ballot access regulations that required prospective parties to file petitions signed by a number of registered voters at least equal to fifteen percent of the numbers of votes cast in the last gubernatorial election, *Williams* v. *Rhodes* 393 U.S. 23 (1968).

The thrust of these decisions is the fear that through the various mechanisms of malapportionment voter elegibility requirements, ballot access regulations and others, the government statutory regulations operate to "freeze the political status quo." *Jenness* v. *Fortson* 403 U.S. 431, 438 (1971). As Professor Tribe has remarked:

> "Democracy envisions rule by successive temporary majorities. The capacity to displace incumbents in favor of the representative of a recently coalesced majority is, therefore, an essential attribute of the election system in a democratic republic. Consequently both citizens and Courts should be chary of efforts by governmental officials to control the very electoral system which is the primary check on their power. Few prospects are so antithetical to the notion of rule by the people as that of a temporary majority entrenching itself by cleverly manipulating the system through which the voters, in theory, can register this dissatisfaction by choosing new leadership."[14]

Thus, in the cases mentioned above the "need for judicial intervention was at a maximum for the political process had consigned a minority of a states citizens to a *permanent* position of inferiority with no real hope of legislative redress." *Valenti* v. *Rockefeller*, supra, at 867. The apportionment schemes in *Reynolds* v. *Sims* and other cases, through vote dilution, the voter elegibility requirements in *Kramer* and *Harper*, through disenfranchisement of minorities, and the ballot access requirements declared unconstitutional in *Williams* v. *Rhodes*, though the practical inability of minority

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[14] *Tribe*, supra, at 774.

political parties to gain a place on the ballot, all stood as a *continuing and permanent* barrier to the practical capacity of the people to displace the incumbents and thus operated to "freeze the status quo."

No such statutory scheme is involved here. There is no suggestion, nor can there be, that District 31 voters were in any way disenfranchised in the general elections held in November 1980, nor that their capacity to freely choose their leadership in the next general elections will in any way be impaired or restricted. Section 5.006 of Electoral Law of Puerto Rico is a vacancy-filling provision, designed to deal with temporary and isolated circumstances, and brought into operation in this case by the unfortunate death of Representative Muniz. As the Court said in *Valenti* v. *Rockefeller,* supra at 867:

> "In this case we are confronted with no fundamental imperfection in the functioning of democracy. No political party or portion of the states citizens can claim that it is permanently disadvantaged by Section 296, or that it lacks effective means of securing legislative reform if the statute is regarded as unsatisfactory. We have, rather, only the unusual, temporary, and unfortunate combination of a tragic event and a reasonable statutory scheme."

In similar words the Court in *Patterson* v. *Burns,* supra, at 751, described the difference between a vacancy-filling provision and the malaportionment cases:

> "Admittedly once the gubernatorial appointment were made, the voters in the Fourth District would stand in a different posture than the rest of the voters of the state. The 'inequality' they would suffer, however would not be the result of a comprehensive, calculated scheme affecting the entire electorate. Rather the Fourth District inequality will be transitory and isolated, brought on by a series of unfortunate circumstances unlikely to occur with any great frequency or widespread incidence in the future."[15]

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[15] *Valenti* and *Patterson* effectively answer appellants argument that Section 5.006 violates the malapportionment decisions. See J.S. p. 8 (2).

The particular circumstances of this case serve to illustrate the distinctions discussed above. The Popular Democratic Party was the opposition party in Puerto Rico during 1976-1980, where the New Progressive Party controlled both the Executive and Legislative branches. Although it has gained control of both houses of the Puerto Rican Legislature, the PDP failed to win the gubernatorial race by some 3,000 votes in the 1980 elections. Of course, Section 5.006 had no relation whatsoever to these events. But with the unfortunate death of Representative Muniz, Section 5.006 has served to preserve a legislative seat won by the *opposition or minority* party in Puerto Rico. The effect of Section 5.006 in the particular instance has been to preserve, until next general election, control of the Legislative seat for the opposition or minority party in Puerto Rico.[16]

Of course, Section 5.006 is completely neutral and the particular effect depends on the particular circumstances. If a New Progressive Party legislator should die or resign, the vacancy can be filled by that party according to the procedures established in Section 5.006. As a matter of fact, in the recent past, the NPP has used 5.006 to fill by party appointment the vacancy created by the resignation of Representative Cruz in 1978. See J.S., app., p. 25a. It was only when the right of appointment became operative for the opposition party that the governor and the NPP voters objected to the Section 5.006 procedures on constitutional grounds.[17]

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[16] Appellants are presumably affiliated with the New Progressive Party which has won the gubernatorial race in the 1980 elections. It is noteworthy to reflect on the position of such litigants as compared with the plaintiffs in cases like *Reynold* v. *Sims*, supra, *Harper* v. *Virginia Board of Elections*, supra, *Kramer* v. *Union Free School District*, supra, and *Williams* v. *Rhodes*, supra.

[17] See note 3.

C. The placement by Section 5.006 of the appointive power in the Party of the deceased legislator does not offend the equal protection of the laws.

Appellants argue that Section 5.006 excludes candidates and voters solely on the basis of "political party membership" J.S. p. 8. Basic voting rights, they argue, have been "absolutely denied to those residents of District 31 who have chosen not to affiliate themselves with the PDP." J.S. p. 9. Thus, appellants argue the procedure of filling the particular vacancy involved in this case discriminates against non-PDP affiliates in violation of the equal protection of the laws. There are two basic flaws in appellants argument.

1- The supposed classification between PDP affiliated voters and non-PDP affiliated voters is non existent. Section 5.006 does not distinguish between political belief or particular party affiliation. The provisions of the Electoral Law apply to all vacancies created by death or otherwise. Thus, it benefits or disadvantages, however one may want to put it, in exactly the same manner, every political party and every affiliated voter. It is only the particular circumstances of this case — the fact that the legislative seat vacated belonged to a PDP Representative — that has placed the power to appoint Muniz's replacement in the Popular Democratic Party. It could have been otherwise. If the seat had belonged to a New Progressive Party representative the appointive power for replacement would lie in such party. Thus the classification established by Section 5.006 is completely *neutral*. On its face it does not single out any particular party or political belief for unequal treatment. [18]

The operation of the statute depends on the particular circumstances of each vacancy in the Commonwealth Legislature. To say therefore, that Section 5.006 is "suspect" be-

[18] The classification contained in 5.006 may be said to be that between the party who won the legislative seat in the last general elections and all other parties who lost. It would seem *a fortiori* that this is a classification perfectly consistent with our system of representative government. This system is based precisely on the principle of majority rule, i.e. distinction between parties that win and parties that lose.

cause it "fences out" a particular sector of the population for the "way they may vote" or because it classifies on the basis of particular "opinions," J.S. p. 9, is to completely misinterpret the language and import of such statute.

2- Second, it is important to remember that we are dealing here with a vacancy-filling provision. Section 5.006 places the appointment power to fill the vacancy created by Representative Muniz on the party to which he was affiliated. We have demonstrated that appointment procedures for filling vacancies in state elective offices are not constitutionally impermissible. Once the constitutionality of the appointment procedure is accepted the problem is *where to place the appointive power.*

At the outset it must be noted that "in considering this method of interim appointment we do not require the 'exacting standard of precision' ordinarily required where the vote itself is directly involved." *Kaelin* v. *Warden* 334 F. Supp. at 607.

The appointment by the political party assures that the replacement representative will share the views and be committed to the same Party Platform as the representative originally elected by District 31 voters. As the Supreme Court of Puerto Rico said in the judgment appealed from, Section 5.006 method of appointment protects the "electoral mandate of the previous general election." J.S. App., p. 14b. Thus, Section 5.006 assures continuity of representation. In *Kaelin* v. *Warden,* supra, at 607, in assessing the validity of an appointment statutory scheme for filling vacancies which required that the appointee be "a member of the same political party as the Commissioner whose place is to be filled" the Court recognized that such requirement "enhances the chance of continuity of representation in that the appointee is more likely to share the views of his predecessor in office." 334 F. Supp., at 607.[19]

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[19] The suggestion that District 31 voters may have voted for Representative Muniz for other reasons than party affiliation may have been true in isolated instances. The statutory scheme, however, should be predicated

In another context this Honorable Court has validated the use of party affiliation as a constitutionally permissible criteria. In the employment and dismissals of policy-making public employees, party affiliation may be used as a criteria "to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Elrod* v. *Burns*, 427 U.S. 347, 367 (1976): *Branti* v. *Finkel*, 100 S. Ct. 1287, 1294 (1980). The position of Representative in the legislative assembly is the classical policy-making position. The legislature is where the basic policy decisions are made and where the party platform is implemented through legislation. Thus, party appointment is the most effective way of assuring that the "policies presumably sanctioned by the electorate" of District 31, in the last general election, are fully implemented.

Again, if appointment of replacements for vacancies in state elective offices is constitutionally permissible, a statutory scheme designed to assure that such appointment preserves "continuity of representation" and "implementation of policies . . . sanctioned by the electorate" can have no constitutional infirmity.[20]

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not on speculative individual possibilities but on the fact that party "affiliation remains the predominant influence on voter choice in low visibility elections such as contests for positions in state legislature." *Branti* v. *Finkel*, 100 S. Ct. 1287, 1301 (1980) (J. Powell, dissenting); Murray & Vedlity, "Party Voting in Lower-Level Electoral Contests" 92 Pol. Sci. Q. 21, 40-41 (1977). This basic characteristic of state elections may be even more true in Puerto Rico due to the special character of its political and party system. See infra, page 19.

[20] Indeed it may be argued that statutory schemes that fail to provide for such interests can be called faulty if not constitutionally infirm. Appointment by the Governor, for instance, an accepted procedure in many states, could result in the appointment of a replacement opposed to the policies and party platform advocated by the original incumbent.

D. Minimum scrutiny should be applied to a statutory scheme providing for a method of filling legislative vacancies different from an open special election.

To decide whether a law violates the Equal Protection Clause, this Court has held that there are essentially three things to be considered: the character of the classification, the individual interest affected by the classification, and the governmental interests asserted in support of the classification. *Dunn* v. *Blumstein*, 405 U.S. 330, 335 (1972); *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968). Then the Court must determine what standard of review is appropriate.[21] *Dunn* v. *Blumstein*, supra at 335.

Our previous discussion shows that the cases where strict scrutiny has been applied reveal circumstances which are far from the facts of this case. We are dealing here merely with a casual selection which depends eliminated on unexpected events.[22] In the general election voters give a full term mandate. There is no reasonable expectancy for a new opportunity to vote during that term. On the contrary, those who voted for the elected representative constitute a winning majority behind a program they expect to be realized. Cf. *Fortson* v. *Morris*, 385, U.S. 231, 250 (Fortas, J., dissenting). When judging the constitutional validity of a scheme designed to protect

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[21] Certainly it is a mistake to assume that all cases involving an elective office or any constitutional attack raised by a voter must be reviewed under the strict scrutiny formula. A consistent line of decisions show that such a high degree of judicial scrutiny is triggered only where restrictions have a real and appreciable impact on ability to exercise the franchise. *Hill* v. *Stone*, 421 US 289 (1975) (Rehinquist J., dissenting). See *McDonald* v. *Board of Election Comm'rs of Chicago*, 394 US 802, 807-808 (1969); *Kramer* v. *Union Free School District No. 15*, supra, at 626-627, n. 6 (1969); *Gordon* v. *Lance*, 403 US 1, 5 (1971); *Bullock* v. *Carter*, 405 US 134, 144 (1972).

[22] Even in cases dealing with scheduled regular elections less than strict scrutiny has been applied. See e.g. *Rosario* v. *Rockefeller*, 410 US 752 (1973).

such expectancies, it is proper to apply the standard of minimal scrutiny.[23] *Kaelin* v. *Warden*, supra, at 607.

E. The statute under attack clearly satisfies even the standard of strict scrutiny.

Applicability of the minimal intervention formula of judicial review is not so important in this case since even assuming that the strict scrutiny rule is applicable, the statutes under attack are constitutionally valid. The P.R. Supreme Court put it this way:

> "There is a compelling public interest directing the lawmaker to consider that the vacant seat belongs to the party who nominated the legislator. Among those compelling interests the following can be singled out: that there be no changes in the legislative balance until the next general election is held, the stability of governmental structures, the protection of the electoral mandate of the previous general election, and the reduction of interpartisan political campaigns to once every four years."[24]

The interests identified by the Supreme Court of Puerto Rico are not without similar counterparts in long regarded decisions of American courts. In *Brennan* v. *Haines*, supra, the Court stated that ". . . the preservation of a legitimate state objective if furthered in an area in which a state has a

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[23] First Amendment claims do not alter the standard of review that should be applied. Certainly strict scrutiny has been applied when a State virtually bars political expression. *Williams* v. *Rhodes*, supra. But the Puerto Rican statutory scheme, unlike that attacked in *Williams*, does not protect a permanent monopoly. Id, at page 32. Since an opportunity to express political views through the electoral process is strongly assured under the Puerto Rican Constitution and statutes, this case is totally beyond the *Williams* doctrine. The "profound national commitment to the principle that debate on public issues should be unhibited, robust and wide open," *New York Times* v. *Sullivan*, 376 US 254, 270, (1964), does not require a never ending political campaign nor any specific method of filling a casual legislative vacancy.

[24] In *Fornaris* v. *Ridge Tool Co.*, 400 US 41 (1970), the Supreme Court reiterated that most deference should be given to the local courts determination on local law. We suggest that a similar approach should be adopted when the Supreme Court decides a point closely related to Puerto Rico's very special political conditions.

compelling interest, i.e., uninterrupted township government . . ., was sufficient to support the constitutional validity of consensus appointments to vacancies in township boards." 455 F. 2d., at 945. See also *Kaelin* v. *Warden*, supra; *Parker* v. *Nobles*, 496 (S.W. 2d 921 (Texas 1973). In a more ample context, the Supreme Court said in *Storer* v. *Brown*, 415 US 724, 736 (1974):[25]

> ". . . It appears obvious to us that the one year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest not only permissible, but compelling . . ."[26]

The Supreme Court's language in *Williams* v. *Rhodes*, supra, at 31, 32, regarding political stability is inapplicable to this case. There the Court did not refuse to hold that stability was promoted through a strong party system not that it was a compelling state interest. What moved the Court to dismiss the argument was the fact that the State was favoring two particular political parties. *Tribe*, supra, at 780. Under Puerto Rican law any party which nominated a winning candidate whose seat becomes vacant is entitled to maintain its full representation according to the people's will in the previous election. Any change in political preferences can be translated into a different result in the next general election. The odious opera-

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[25] Even the dissenting opinion recognized that preserving governmental stability was a compelling state interest. 415 US, at 760 (Brennan J., dissenting). In this case the achievement of the compelling state interest cannot be possible through less drastic means. Id.

[26] Appellants' effort to distinguish *Storer* in fact illustrates why its holding applies to these cases. There the interest in stability of the political system was strong enough to prevail over "the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status," 415 US, at 736, even though it was related to a desire to prevent "interparty raiding" and to avoid "frivolous or fraudulent candidacies," Id. at 731-733. In this case stability is connected with the protection of an electoral mandate, the balance of legislature forces and a social effort to reduce inter-partisan campaigns to once every four years. These interests, of course, are of higher value and importance.

tion of a permanent monopoly repudiated in *Williams* is therefore non existent. See 393, U.S., at 32.

The fact that Art. I, Section 2, Clause 4 of the United States Constitution and many state Constitutions or statutes provide for a special election to fill a legislative vacancy is wholly irrelevant.[27] The federal constitutional requirement to fill a House vacancy through a special election reflects a policy choice. It is of the same nature as the provision of two year terms for national congressman. State decisions on these matters should be also viewed as policy choices. Cf. *National League of Cities* v. *Usery*, 426 US 833 (1976). The Supreme Court has often recognized that the states should be afforded flexibility to tailor viable local governmental structures to meet their particular needs. *Hadley* v. *Junior College District*, 397 US 50, 59 (1970); *Avery* v. *Midland County*, 390 US 474, 485 (1968); *Sailors* v. *Board of Education*, 387 US 105, 110-111 (1967); *Kaelin* v. *Warden*, supra, at 605-606. See also *Fortson* v. *Morris*, supra. A proper degree of autonomy is even reflected in how a vacancy in the office of Federal Senator is to be filled. See *Valenti* v. *Rockefeller*, supra. A remedial scheme for an identified evil is not affected because other sovereign governmental authorities have not either identified such an evil or decided to provide for a solution. Cf. *McDonald* v. *Board of Election Commissioners of Chicago*, 394 US 802, 809 (1969). What may be a fundamental problem for a community might be unimportant for another.

Puerto Rico's unique political situation and status provide a very appropriate scenario for observing the importance of the interests identified by its Supreme Court.[28] While political par-

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[27] See note 6.

[28] Puerto Rico is an autonomous self-governing political entity associated to the United States. See *Calero Toledo* v. *Pearson Yatch Leasing Co.*, 416 US 663 (1974). It is neither a territory nor a State. Its present status is the consequence of a unique political process. Congress invited Puerto Ricans to enter into a compact in 1951 through the approval of the Puerto Rican Federal Relations Act, 64 Stat. 319. Puerto Ricans accepted the invitation and pursuant to the terms of the compact adopted their own Constitution. See *Mora* v. *Mejias*, 206 F 2d. 377 (1953), *Cordova and Simonpietri Ins.*

ties in the United States have been characterized by a fluidity and overlap of philosophy and membership, *Rosario* v. *Rockefelier*, 410 U.S. 752 (1973), at 769, Puerto Rican parties are strongly attached to ideological principles and discipline. Since Puerto Rico's final political status is still open to wide discussion every election represents a special event of ideological battle. It is not surprising to observe that most of Puerto Rico's problems are treated as political issues.

Puerto Rican political parties are undoubtedly the most effective instruments of public expression. The legislative power was created and is now organized according to this truism. To guarantee the effectiveness of the political parties and to assure fair representation, the Puerto Rican Constitution provides for two types of representation. Forty members of the House come from an equal number of representative districts and eleven are elected at large, P.R. Const., Art. III, S. 3. Since each elector can vote for only one at large candidate for the House, it is almost sure that those seats will be distributed among various political parties. See Puerto Rico's Electoral Law, Articles 4.004 and 4.006, 16 LPRA 3154 & 3156. Each party is authorized to divide among its at Large candidates the straight ballots it shall receive. Id. See *Garcia Passalacqua* v. *Tribunal Electoral*, 105 DPR 41 (1976). A reasonable minority representation is assured when a political party obtains an overwhelming majority through additional representatives who are certified notwithstanding the fact they were not directly elected.[29] Additional representatives come only from

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Agency Inc. v. *Chase Manhattan Bank*, 649 F 2d 36 (1981). This Constitution has ruled Puerto Rican life since 1952. In transmitting it to Congress, President Truman recognized that with such approval "full authority and responsibility for local self-government will be vested in the people of Puerto Rico." Quoted in *Liquilux Gas Services of Ponce, Inc.* v. *Tropical Gas Co.*, 303 F. Supp. 414, 418 (1969). The United Nations approved this new relationship after being so required by the United States Gen. Ass. Res. 748 (VII) (1953).

[29] Section 7 of Article 7 of the Commonwealth of Puerto Rico provides:

§ 7. [Representation of minority parties; additional members]

minority parties who comply with party support requirements. See *Fuster* v. *Buso*, 102 DPR 327, (1973).

Another illustration of a long standing interest in protecting the efficiency of political parties as a means of public expression is found precisely in the subject of legislative vacancies. The original constitutional text provided for a partisan substitution for at-large legislators as well as for district legislators when the vacancy occurred less than fifteen months prior to the next general election, for a party appointment if the vacancy occurred during a legislative session, and for a special election when a district legislative seat vacancy occurred before a fifteen month period prior to the next election.[30] The

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If in a general election more than two-thirds of the members of either house are elected from one political party or from a single ticket, as both are defined by law, the number of members shall be increased in the following cases:

(a) If the party or ticket which elected more than two-thirds of the members of either or both houses shall have obtained less than two-thirds of the total number of votes cast for the office of Governor, the number of members of the Senate or of the House of Representatives or of both bodies, whichever may be the case, shall be increased by declaring elected a sufficient number of candidates of the minority party or parties to bring the total number of members of the minority party or parties to nine in the Senate and to seventeen in the House of Representatives. . . .

The additional Senators and Representatives whose election is declared under this section shall be considered for all purposes as Senators at Large or Representatives at Large.

The measures necessary to implement these guarantees, the method of adjudicating fractions that may result from the application of the rules contained in this section, and the minimum number of votes that a minority party must cast in favor of its candidate for Governor in order to have the right to representation provided herein shall be determined by the Legislative Assembly.

[30] The original text of Art. III, Section 8, provided:

" — The term of office of Senators and Representatives shall begin on the second day of January immediately following the date of the general election in which they have been elected. If, prior to the fifteen months immediately preceding the date of the next general election, a vacancy occur in the office of Senator or Representative for a district, the governor shall call a special

latest provision was vigorously attacked. See J.S., Appendix A, p. 9a. Unnecessary efforts and political campaign, as well as money and energy expenses, were invoked as reasons to refuse the election system. Id. Experiences showed this position was sound. A House Committee which recommended the approval of a constitutional amendment providing for legislative discretion to establish statutory methods to fill legislative district vacancies stated:

> ". . . it has been amply shown that holding of a local special election in the above-mentioned cases is an unduly burdensome requirement which forces the Commonwealth to incur great expenses to defray it while also forcing the political parties [to] launch political campaigns which greatly diminish their economic resources. And we cannot say that the positive aspects offered by this

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election in said district within thirty days following the date on which the vacancy occurs. This election shall be held not later than ninety days after the call, and the person elected shall hold office for the rest of the unexpired term of his predecessor. When said vacancy occurs during a legislative session, or when the Legislative Assembly or the Senate has been called for a date prior to the certification of the results of the special election, the presiding officer of the appropriate house shall fill said vacancy by appointing the person recommended by the central committee of the political party of which his predecessor in office was a member. Such person shall hold the office until certification of the election of the candidate who was elected. When the vacancy occurs, within fifteen months prior to a general election, or when it occurs in the office of a Senator at Large or a Representative at Large, the presiding officer of the appropriate house shall fill it upon the recommendation of the political party of which the previous holder of the office was a member, by appointing a person selected in the same manner as that in which his predecessor was selected. A vacancy in the office of a Senator at Large or a Representative at Large elected as an independent candidate shall be filled by an election in all districts."

Section 9. — Each house shall be the sole judge of the election, returns and qualifications of its members; shall choose its own officers; shall adopt rules for its own proceedings appropriate to legislative bodies; and, with the concurrence of three-fourths of the total number of members of which it is composed, may expel any member for the causes established in Section 21 of this Article, authorizing impeachments. The Senate shall elect a President and the House of Representatives a Speaker from among their respective members.

> method can balance the inconvenience and negative extent of such elections."[31]

After being approved by the House the amendment proposal was discussed by the Senate. There its intent emerges with more clarity. Both majority and minority leaders agreed upon the point that the amendment was needed to permit the methods of filling district vacancies similar to that used to fill vacant at large seats. J.S. App. A, p. 15a-17a. The minority leader petitioned for an amendment to the committee report which inserted the following excerpt:

> ". . . always guaranteeing that the responsibility and the right to propose a substitute shall lie with the party to which the Senator or Representative who caused the vacancy belonged."[32]

The amendment which gives to the Legislative Assembly discretion to determine how Legislature vacancies are to be filled was approved by the people of Puerto Rico.[33] Since then all vacancies have been filled by the party to which the elected legislator belonged. J.S. Appendix A, p. 23a-27a. The method is so deeply rooted that the Puerto Rico Elections Commission recently adopted a memo drafted by its legal counsel in

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[31] J.S. App. A, page 12a.

[32] J.S. App. A, page 16a.

[33] Section 8, of Article II now states:

[Terms of office; vacancies]

The term of office of Senators and Representatives shall begin on the second day of January immediately following the date of the general election on which they shall have been elected. *If a vacancy occurs in the office of Senator or Representative for a district, such vacancy shall be filled as provided by law.* When the vacancy occurs in the office of a Senator at Large or a Representative at Large, the presiding officer of the appropriate house shall fill it, upon recommendation of the political party to which belonged the Senator or Representative causing the vacancy, with a candidate selected in the same manner as that in which his predecessor was selected. A vacancy in the office of a Senator or Representative at Large elected as an independent candidate, shall be filled by an election in all districts. [As amended by the voters at a referendum held Nov. 3, 1964]. (Emphasis added).

which it is suggested that an open special election would be an absurdity. J.S. Appendix B, pages 11b-12b and note 4.

Political convulsion, now more than ever present in Puerto Rican life, confirms the soundness of a method designed to promote stability through limiting political campaigning to only once every four years. As appellants state the PDP won house control by a one vote majority. The decisive seat was recently adjudicated by the Supreme Court of Puerto Rico to the PDP, but a petition for Certiorari is now pending before this Court. See *Osvaldo Molina* v. *Popular Democratic Party*, Petition of Certiorari No. 81-434. The District No. 31 vacancy gave to the NPP a new hope to regain House control even though its decision to contest the PDP's right to preserve the seat was inconsistent with the NPP's prior conduct in utilizing the appointment procedure.[34] In view of possibilities like this, the Puerto Rico Legislative Assembly's determination to limit political campaigns to once every four years looks not only proper but very rational. The certainty that the mandate given by the people will not be revised within a reasonable four years term gives to Puerto Rican people a needed expectancy for some political repose and governmental continuity.

All the historical, social and political facts already mentioned are far from representing mere adminstrative conveniences. See *Kaelin* v. *Warden*, supra, at 607. Nor is the statute an attempt to deal with a remote danger which is theoretically unimaginable. Compare *Williams* v. *Rhodes*, supra, at 33. The social benefit is easy to find, its political and historical roots are evident, and the dangers feared by constitutional reformers and statute drafters are not far from Puerto Rican reality.

II

A REVERSAL IN THIS CASE WOULD CAUSE A SERIOUS DISRUPTION IN BOTH PUERTO RICAN AND AMERICAN GOVERNMENTAL STRUCTURES.

In the beginning of this motion we suggested the proper framing for the question presented by appellants.[35] Certainly

[34] See note 3.

[35] See Questions Presented in this motion.

the constitutional principle invoked by appellants cannot be limited to Commonwealth or State legislative vacancies created by the death or resignation of a district legislator. If the Court finds that an open election is required by the Constitution, the same rationale should be applied to all vacant elective offices.

In the case of Puerto Rico all vacant elective offices are filled by methods similar to that established by Article 5.006 of the Electional Law. When the office of Governor is vacant, the Secretary of State, who is an appointed official, becomes Governor. PR Const. Art. IV Section 7. When an elected mayor dies, resigns or leaves his office for any other reason, his party has the right to appoint a new incumbent. 21 LPRA 3101 & 3003. A similar procedure is followed when a vacancy in a Municipal Assembly occurs. 21 LPRA 3057(c). Party appointments are established by the Commonwealth Constitution for a vacancy in an at large legislative seat. PR Const. Art. III 58.

The question also involves more than a group of State Legislatures. See JS App. G. If those States are required by the Constitution to provide for an election when a legislative seat is vacant, also all of the States should be forced to call special elections for vacancies in the offices of Governor, Mayor, County President and Sheriff, and in elective collegiate policy making bodies such as school boards, city councils, county assemblies and boards of trustees. See *Parker* v. *Nobles*, supra (Sheriff); *Wilson* v. *Oklahoma City Council*, supra (City Council); *Kaelin* v. *Warden*, supra (County Commissioner); *Patterson* v. *Burns*, supra (nominee to State Senator); *Farley* v. *Farley*, supra (county commissioner); *Brennan* v. *Haines*, supra (Township board). In other words, no legislative scheme providing for appointments or party election to fill vacancies in elective offices would be valid under the Federal Constitution. This of course, would create a serious disruption in State governmental structures.

CONCLUSION

For the reasons stated, the Court should dismiss the appeal for lack of a substantial federal question.

Respectfully submitted.

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MARCOS A. RAMIREZ
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Appendix

APPENDIX A

COMISION ESTATAL DE ELECCIONES

VOTO BAJO INSIGNIA DE PARTIDO EN COMPARACION CON VOTOS OBTENIDOS POR CANDIDATOS A GOBERNADOR

ELECCIONES GENERALES 1980

PRECINTOS		CARLOS ROMERO BARCELO (PNP)			RAFAEL HERNANDEZ COLON (PPD)			RUBEN BERRIOS MARTINEZ (PIP)			LUIS LAUSELL HERNANDEZ		
		Bajo Insignia	Candidato	Diferencia	Bajo Insignia	Candidato	Diferencia	Bajo Insignia	Candidato	Diferencia	Bajo Insignia	Candidato	Diferencia
DISTRITO SENATORIAL NUM. 1 - SAN JUAN													
an Juan	1	15361	15543	182	9468	9643	175						
an Juan	2	15427	15573	146	9465	9572	107						
an Juan	3	13392	13483	91	11859	12049	210						
an Juan	4	16646	16848	202	14163	14369	206						
an Juan	5	16644	16809	165	12551	12749	198						
TOTALES DEL DISTRITO		77470	78256	786	57486	58382	896						
DISTRITO SENATORIAL NUM. 2 - BAYAMON													
ayamón	6	7504	7573	69	4805	4903	98						
ayamón	9	1817	1834	17	1798	1812	14						
ayamón	7	10246	10329	83	8254	8406	152						
ayamón	8	19527	19710	123	18177	18409	232						
ayamón	10	9454	9528	74	8791	8884	113						
ayamón	16	10319	10402	83	8134	8237	103						
orgal	11	7608	7626	18	7449	7484	35						
aranjito	12	4810	4861	51	7904	7961	47						
na Alta	13	6326	6404	78	6856	6906	50						
na Baja	14	5716	5789	73	5964	6019	55						
a Baja	18	10256	10358	102	9259	9342	83						
rado	15	1550	1566	16	2645	2663	18						
rado	19	3811	3874	63	4421	4466	45						
raño	17	6668	6715	47	4797	4863	66						
TOTALES DEL DISTRITO		105172	106069	897	99224	100335	1111						
DISTRITO SENATORIAL NUM. 3 - ARECIBO													
a Alta	20	6373	6411	38	7223	7277	54						
a Baja	21	10624	10735	111	11569	11651	82						
atf	22	3641	3670	29	2960	3001	41						
atf	27	6302	6333	31	5946	5901	55						
covia	23	5215	5241	26	6234	6284	50						
ocovia	24	5571	5596	25	5165	5193	28						
ales	25	4626	4638	12	4212	4223	11						
ywya	26	3839	3856	17	3529	3560	31						
rceloneta	28	5235	5295	60	5174	5202	28						
orida	29	1936	1953	17	1795	1823	28						
recibo	30	8492	8538	46	8416	8461	35						
recibo	31	14150	14232	82	13413	13486	73						
tillo	32	6326	6369	43	7539	7582	43						
tillo	33	506	510	4	590	592	2						
uy	34	6531	6594	63	6915	6962	47						
ebradillas	35	4659	4702	43	5185	5233	48						
abela	36	8215	8278	63	9945	10006	60						
TOTALES DEL DISTRITO		102241	102951	710	105710	106426	716						
DISTRITO SENATORIAL NUM. 4 - MAYAGUEZ-AGUADILLA													
guadilla	37	12882	13012	130	12652	12702	50						
co	38	5133	5156	23	5258	5291	33						
co	39	2178	2182	4	1796	1809	13						
uada	40	7578	7654	76	7113	7175	62						
ncán	41	2582	2612	30	3720	3744	24						
asco	42	5684	5720	36	6290	6336	46						
yagüez	43	2216	2243	27	3246	3285	39						
yagüez	44	14344	14482	138	17373	17512	139						
yagüez	45	3721	3752	31	4466	4488	22						
n Sebastián	46	7813	7872	59	9941	10048	107						
n Marías	47	1766	1785	19	2580	2611	31						
ricao	48	1604	1611	7	1759	1769	10						
rnigueros	49	3063	3098	35	4102	4138	36						
n Germán	50	890	900	10	1187	1193	6						
n Germán	51	6509	6641	132	7773	7845	72						
bo Rojo	52	7059	7252	193	8747	8955	208						
ajos	53	4510	4603	93	6203	6288	85						
TOTALES DEL DISTRITO		90032	91075	1043	104206	105189	983						

VOTO BAJO INSIGNIA DE PARTIDO EN COMPARACION CON VOTOS OBTENIDOS POR CANDIDATOS A GOBERNADOR
ELECCIONES GENERALES 1980 - (CONTINUACION)

PRECINTOS		CARLOS ROMERO BARCELO (PNP)			RAFAEL HERNANDEZ COLON (PPD)			RUBEN BERRIOS MARTINEZ (PIP)			LUIS LAUSELL HERNANDEZ (PSP)		
		Bajo Insignia	Candidato	Diferencia	Bajo Insignia	Candidato	Diferencia	Bajo Insignia	Candidato	Diferencia	Bajo Insignia	Candidato	Diferencia
DISTRITO SENATORIAL NUM. 5 - PONCE													
Llana Grande	54	3604	3662	58	7006	7056	50						
Única	55	4162	4240	78	4629	4682	53						
uco	56	8358	8431	73	9731	9873	142						
ayanilla	57	319	321	2	388	398	10						
yanilla	62	4054	4106	52	4854	4929	75						
rea	58	6269	6295	26	7089	7126	37						
ado	59	8746	9002	56	8790	8917	27						
Juntas	60	1916	1928	12	2052	2074	22						
iuntas	61	3017	3025	8	3054	3070	16						
Juelas	63	3980	4064	84	4792	4833	41						
nca	64	9352	9434	82	8251	8363	112						
nce	65	15796	15905	109	12825	12954	129						
nca	66	16085	16113	78	13045	13189	144						
OTALES DEL DISTRITO		85808	86526	718	86512	87370	858						
DISTRITO SENATORIAL NUM. 6 - CUATAMA													
Alba	67	4909	4975	66	4710	4742	32						
na Díaz	68	9189	9274	91	9292	9341	49						
ta Isabel	69	3280	3327	47	3763	3801	38						
ta Isabel	70	716	720	4	1124	1133	9						
no	71	7882	7962	80	8461	8519	58						
Linas	72	4879	4947	68	7211	7299	88						
bonito	73	3275	3299	24	5012	5053	41						
bonito	74	692	697	5	1455	1469	14						
rranquitas	75	5408	5442	34	5909	5963	54						
erto	76	4381	4415	34	5137	5180	43						
os Buenos	77	5310	5352	42	6471	6517	46						
ra	78	2577	2610	33	2898	2925	27						
ra	79	4408	4426	18	4014	4048	34						
ey	80	8536	8621	85	11278	11365	87						
yama	81	2345	2365	20	2548	2568	20						
yama	82	5980	6039	59	6511	6609	98						
nabo	83	2424	2958	34	3138	3181	43						
illas	84	4614	4646	32	4886	4958	72						
royo	85	4163	4193	30	4068	4134	66						
TALES DEL DISTRITO		85662	86468	806	96886	97805	919						
DISTRITO SENATORIAL NUM. 7 - HUMACAO													
uas	86	18378	18495	117	19201	19388	187						
uas	87	8597	8665	68	8932	8998	66						
	88	7009	7048	39	6883	6932	49						
abo	89	5630	5698	68	6437	6522	85						
Lorenzo	90	8658	8753	95	8217	8269	52						
ucas	91	8121	8193	72	8746	8836	90						
Piedras	92	4154	4179	25	3049	3083	34						
Piedras	95	2361	2375	14	3144	3165	21						
ncas	93	9691	9790	99	13057	13235	178						
abo	94	5317	5361	44	5632	5678	46						
as	96	980	994	14	764	766	2						
a	102	1776	1815	39	1842	1868	26						
Grande	97	7797	7819	82	7607	7719	112						
illa	98	3765	3812	47	3653	3691	38						
rdo	99	7395	7485	90	7133	7184	51						
bra	100	240	240	0	388	393	5						
ta	101	1732	1765	33	2270	2294	24						
TALES DEL DISTRITO		101541	102487	946	106955	108021	1066						
DISTRITO SENATORIAL NUM. 8 - CAROLINA													
vanas	103	6052	6100	48	8091	8189	98						
as	104	5279	5358	79	2852	2909	57						
olina	105	12200	12334	134	11856	11995	139						
olina	106	20151	20378	227	15809	16063	254						
olina	107	3798	3854	56	3154	3198	44						
illo Alto	108	5633	5714	81	5209	5291	82						
illo Alto	110	4534	4609	75	4642	4713	71						
Juan	109	14753	14937	184	12187	12485	298						
Juan	111	13471	13550	79	11559	11749	190						
Juan	112	7440	7539	99	6637	6790	153						
Juan	113	11612	11721	109	9893	9981	88						
TALES DEL DISTRITO		104923	106094	1171	91889	93361	1472						

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P.R. STATE ELECTIONS COMMISSION

RAMON BAUZA ESCOBALES
ACTING STATE ELECTIONS SECRETARY

ESTADO LIBRE ASOCIADO DE PUERTO RICO

COMISION ESTATAL DE ELECCIONES

RESUMEN DEL VOTO TOTAL PARA ASAMBLEISTAS MUNICIPALES POR PARTIDO

MUNICIPIO: CAGUAS PRECINTOS: 86 - 87

PARTIDO NUEVO PROGRESISTA	TOTAL VOTOS	PARTIDO POPULAR DEMOCRATICO	TOTAL VOTOS	PARTIDO INDEPENDENTISTA PUERTORRIQUEÑO	TOTAL VOTOS	PARTIDO SOCIALISTA PUERTORRIQUEÑO	TOTAL VOTOS
Lydia Bermúdez de Berríos	27014	Juan Justino Colón Berríos	28200	Raúl Tirado Menéndez	3513	Juan R. Cruz	184
Críspulo Morales Sánchez	27018	Gilberto Castillo	28198	Gloria Rijos	3504	Edgardo Algarín Otero	181
Domingo Trinidad Rodríguez	27013	Luis Rivera	28199	Ramón Ramos Santiago	3507	Miguel A. Hidulgo Vega	184
Carmen García Ortíz	27046	Cristóbal Ortíz	28189	José L. Cabezudo Núñez	3492	Carmen Rosa Mirabal Conde	188
Hermi H. López Rodríguez	27008	Gubriel Díaz	28194	Lucila Denizard	3485	Teresa Torres Villegas	185
José R. Díaz Coss	27009	Angel Villarini	28206	Héctor Vázquez Lozada	3475	Aníbal Lebrón Mollet	184
Jorge Luis Clase	27005	Imilse Cintrón	28201	Aleja Acevedo	3475	Luis N. Rosado Maldonado	181
Genaro López Montañez	27003	Miguel Aponte	28198	Ernesto Caballero Ramírez	3473	Cruz Merced Rodríguez	179
Víctor Rechani Caballero	27003	María C. Loubriel	28197	Andrés Reyes	3476	Francisco Flores Cruz	181
Marcial Rosa Colón	27003	Juan Pérez	28187	José M. Pereira	3483		
Angel Ramos González	26998	Efraín Díaz Caballero	28192	Félix Torres Vélez	3475	Antonio Grillasca Domenech	185
Florentino Pérez Figueroa	26993	Evaristo Rodríguez	28174	Ramón Erasmo Velázquez Rivera	3497	Cynthia G. Collazo Berríos	178
Angel Báez Carrillo	26950	Miguel Rodríguez	28115	Margarita Florez	3446	Domingo Casillas Vega	184

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PUERTO RICO'S STATE ELECTIONS COMMISSION

RAMON BAUZA ESCOBALES, ACTING STATE ELECTIONS SECRETARY

Appellant's Reply Brief

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SEP 30 1981
ALEXANDER L. STEVAS

No. 81-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JESUS RIVERA RODRIGUEZ, *et al.*,
Appellants

v.

POPULAR DEMOCRATIC PARTY, *et al.*,
Appellees

On Appeal from
the Supreme Court of Puerto Rico

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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TABLE OF CONTENTS

		Page
I.	THERE IS A SUBSTANTIAL QUESTION ABOUT THE VALIDITY OF A STATUTE AUTHORIZING A POLITICAL PARTY TO FILL A VACANCY IN THE GENERAL LEGISLATURE BY APPOINTING THE SUCCESSFUL CANDIDATE IN AN ELECTION FROM WHICH ALL NON-PARTY MEMBERS HAVE BEEN EXCLUDED	1
II.	THE RELEVANT CONSTITUTIONAL DOCTRINES CANNOT BE DISTINGUISHED AWAY	3
III.	THE PUERTO RICO ELECTORAL LAW MUST BE TESTED BY THE "STRICT SCRUTINY" STANDARD	6
IV.	THIS CASE POSES NO THREAT OF DISRUPTION OF "GOVERNMENTAL STRUCTURES"	8
CONCLUSION		9

TABLE OF AUTHORITIES

	Page
CASES:	
Ball v. James, 49 U.S.L.W. 4459 (U.S. decided April 29, 1981)	5
Harper v. Virginia Board of Elections, 383 U.S. 663 (1966)	5
Jenness v. Fortson, 403 U.S. 431 (1971)	4
Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969)	5
Reynolds v. Sims, 377 U.S. 533 (1964)	4
Torres v. Puerto Rico, 422 U.S. 465 (1979)	6
Valenti v. Rockefeller, 292 F. Supp. 851 (S.D.N.Y. 1968), *aff'd per curiam*, 393 U.S. 405 (1969)	2,3
U.S. CONSTITUTION:	
Article I, § 2	2
Article I, § 3	2
Amendment XVII	2
STATUTES:	
Puerto Rican Federal Relations Act, 48 U.S.C. §731c.	7
Puerto Rico Constitution Approval Act of July 3, 1952, Pub. L. 447, 66 Stat. 327 (1952)	7
MISCELLANEOUS:	
L. Tribe, AMERICAN CONSTITUTIONAL LAW, § 13-18 (1978)	4

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BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellants oppose the motion of the appellee Popular Democratic Party ("PDP") to dismiss for want of a substantial federal question.

I. THERE IS A SUBSTANTIAL QUESTION ABOUT THE VALIDITY OF A STATUTE AUTHORIZING A POLITICAL PARTY TO FILL A VACANCY IN THE GENERAL LEGISLATURE BY APPOINTING THE SUCCESSFUL CANDIDATE IN AN ELECTION FROM WHICH ALL NON-PARTY MEMBERS HAVE BEEN EXCLUDED.

1. In its motion (at 3-8), the PDP relies on several decisions by lower federal courts sustaining statutes that permit the filling of vacancies by appointment. This Court has never approved those decisions, even on their limited facts. For the

most part, however, those decisions dealt with vacancies in city councils or county commissions, not in legislatures exercising general, State-wide law-making power. In each instance, the person or body authorized to make the disputed appointment was an elected public official or body, owing allegiance to the entire electorate, not a particular political party. This distinction may have independent constitutional significance. *See* p. 5, *infra.*

Moreover, in not one of these cases was the appointee actually chosen through an election in which only the members of a single party were permitted to participate either as candidates or electors. In this case, by contrast, a position in the Puerto Rico House of Representatives has been filled for essentially the entire legislative term through an appointment by the PDP of a candidate chosen in a special primary election from which all non-PDP members were excluded.

2. Following the lead of the court below, appellees argue that *Valenti v. Rockefeller,* 292 F. Supp. 851 (S.D.N.Y. 1968), *affirmed per curiam,* 393 U.S. 405 (1969), establishes the validity of the Puerto Rico appointment statute. The PDP emphasizes that an appointment of an interim United States Senator for a period of 29 months was sustained there even though the Seventeenth Amendment generally requires the filling of such vacancies by election. The Seventeenth Amendment, however, marked a change in the historic constitutional provision of Article I, Section 3 of the Constitution under which Senators were appointed by State legislatures. It, therefore, expressly authorized each legislature to permit the governor to make "temporary" appointments "until the people fill the vacancies by election . . . ."

This unique provision for filling vacancies in a legislative body that, for more than a century, had been appointive, hardly disproves appellants' contention that the Constitution generally contemplates that popular legislative bodies, including State legislatures, must be elected by the general populace, with any vacancies filled (except perhaps for vacancies arising shortly before a general election) by open by-elections. *Compare* U.S. Const. Art. I, § 2 (vacancies in U.S. House of Representatives

must be filled by election). Indeed, as shown by Appendix G to the Jurisdictional Statement, the great majority of States adhere to the electoral process for filling vacancies in their legislatures.

Furthermore, nothing in *Valenti* supports the appointment of a successor legislator by a political party, let alone the selection of such a legislator through an election limited to the members of that party. As Appendix G also shows, relatively few States consider it permissible to permit a single party to control the filling of a legislative vacancy. No State permits what the Court below has authorized in this case: the seating of a new Representative who was selected in a special election in which all voters might just as easily have participated, but from which all but PDP-members were excluded.

3. The issue presented by the PDP's motion to dismiss is whether the Court should reject appellants' appeal summarily for failure even to present a substantial federal question. As explained in the Jurisdictional Statement (J.S. 6-9), however, the appointive system condoned here conflicts with several lines of decision by this Court protecting the right of all citizens to vote for their legislative representatives. Although this Court has never considered the relationship between those doctrines and the selection of successor legislators, the conflict seems so sharp and clear that summary reversal would not be out of order. But at the very least, appellants' challenge presents issues meriting plenary consideration.

II. THE RELEVANT CONSTITUTIONAL DOCTRINES CANNOT BE DISTINGUISHED AWAY.

1. The PDP contends (at 12-14) that the statutory system at issue here is neutral on its face, because it allows *any* party whose candidate won an election to appoint a successor. From this, the PDP reasons that the system somehow passes constitutional muster. But this argument begs the question. The issue is whether, with *any* legislative vacancy, some or all voters may lawfully be frozen out of the selection of the new legislator. We maintain that *no* political party may be given this power, either through direct appointment or through the kind of one-

party election that led to the choosing of the new Representative for the people of District 31. For the purpose of these arguments, it matters not at all that the identity of the political party exercising this exclusive power may vary from vacancy to vacancy.*

2. The PDP argues (at 10) that the Puerto Rico statute is distinguishable from those that this Court has invalidated because it does not involve "permanent" malapportionment or "permanent" infringement of the franchise, but merely "temporary" restrictions. This Court has never had occasion to consider, much less embrace, the constitutional sufficiency of these distinctions, but they are of doubtful force. The fact is that the Puerto Rico statute "freeze[s] the political *status quo*," *Jenness v. Fortson*, 403 U.S. 431, 438 (1971), by imposing on the electorate for nearly four years a party-selected candidate for whom the general electorate has been denied the opportunity to vote. The disenfranchised voters of District 31, like appellants, scarcely regard this peremptory imposition as only a minimal interference with their "inalienable right to full and effective participation in the political processes of [their] State's legislative bodies." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

3. The PDP also attempts (at 12) to justify the "party ownership" system on the ground that it allows that party, as the former "opposition or minority party," to retain control of the legislature, which it won for the first time in 1980. Appellants have no doubt that the PDP — or any other political party that invokes the challenged statute — has an interest in preserving its own political power. Nothing in the United States Constitution, however, accords any political party a

* Nor is this system simply an innocent manifestation of the principle of "majority rule," as the PDP contends (at 13, n.18). The question presented is whether a possibly transitory majority in favor of a particular *candidate* affiliated with a party provides a constitutionally sufficient mandate entitling the *party* to select the successful candidate's replacement, even though that majority — or a "recently coalesced majority," Tribe, AMERICAN CONSTITUTIONAL LAW §§ 13-18, at 774 (1978) — may not support the replacement at all.

vested right in maintaining a constant level of legislative power despite its inability to secure popular support for its candidate in a by-election. *See* J.S. at 13-14. The PDP's argument frankly admits that the challenged statute does nothing more than guarantee the PDP a four-year reign acquired as the result of the voters' choice for specific candidates, even after one of the persons chosen has died and even if the voters would not support the successor installed by the PDP in his stead. This admission should be fatal to the defense of the statute.

4. The PDP next insists (at 14) that, if it is permissible to fill vacancies by appointment, it makes no constitutional difference where the appointing power is lodged or how it is exercised. This argument, too, is overly ambitious. This Court has suggested (but not decided) that appointment rather than election of certain governmental bodies — although not necessarily general legislatures — may be acceptable, if the appointing power is lodged in some public official or governmental agency with its own electoral mandate. *See Kramer v. Union Free School District No. 15,* 395 U.S. 621, 629 & n.12 (1969). *See also Ball v. James,* 49 U.S.L.W. 4459, 4463 & n.20 (majority opinion), 4464 (Powell, J., concurring), 4468 n.11 (dissenting opinion) (U.S. April 29, 1981). This Court has never even remotely suggested, however, that appointments to a general legislative body by a particular political party may be a constitutionally adequate substitute for elections.

Furthermore, the PDP's argument ignores this Court's explicit holding in *Kramer v. Union Free School District No. 15, supra,* that, even if an election is not required, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause . . . ." 395 U.S. at 629, *quoting Harper v. Virginia Board of Elections,* 383 U.S. 663, 665 (1966). Here, Puerto Rico has permitted the installation of a legislator chosen by a flagrantly unfair and skewed election in which only members of the PDP were allowed to participate as candidates and voters.

III. THE PUERTO RICO ELECTORAL LAW MUST BE TESTED BY THE "STRICT SCRUTINY" STANDARD.

1. Terming the process merely one of "casual" selection of a successor, the PDP argues (at 16) that only "minimal scrutiny" of the fairness and consequences of the election system is appropriate because voters have no reasonable expectation of participating in by-elections. As explained in the Jurisdictional Statement (J.S. 9-10), however, the "strict scrutiny" standard applies in measuring the validity of restrictions on the franchise and in testing the reasonableness of classifications based on political affiliation. Moreover, the 40,000 voters in District 31, including appellants, are unlikely to agree with the PDP that it is simply a "casual" question, on which they could not possibly anticipate voting, who is to serve as their representative in the legislature for nearly four years.

2. A system entitling a political party to fill a legislative vacancy by a skewed election does not satisfy the "strict scrutiny" standard. In our Jurisdictional Statement (J.S. 12-16), we explained why the general references by the court below and the PDP to State interests in this system are constitutionally inadequate. The PDP now suggests (at 19) that the States should be afforded "flexibility" and a "degree of autonomy" in deciding how to choose successor legislators. Without quarrelling with those general ideals, we note that the PDP again begs the question. The issue is whether a State's autonomy sweeps so broadly as to justify a system that disenfranchises a substantial segment of the electorate, undermines "the one-person, one-vote" principle, and discriminates against otherwise eligible voters on the basis of party affiliation. Federalism may provide reason for *some* "flexibility" and "autonomy," but it cannot justify infringement of fundamental constitutional rights.

3. The PDP also invokes Puerto Rico's "unique political ... status" (at 19) and the allegedly unique role of political parties in Puerto Rico. This Court, however, has repeatedly reaffirmed that the relevant constitutional principles of the United States Constitution apply with full force to Puerto Rico. *See Torres v. Puerto Rico*, 442 U.S. 465, 469-70 (1979), and

cases cited therein. Furthermore, in sustaining the constitutionality of the Puerto Rico electoral law, the court below did not rely on anything unique about Puerto Rico or its political parties. Rather, correctly perceiving that federal constitutional principles applicable throughout the rest of the United States also govern Puerto Rico, the court below concluded that Puerto Rico is free to adopt the "party ownership" system because any State, according to that court, could do so. That is the holding we challenge.

References to the Compact between Puerto Rico and the United States also miss the mark. Both the statute authorizing the people of Puerto Rico to formulate a constitution and the act of Congress approving it expressly stipulated that the United States Constitution would apply, that Puerto Rico must adhere to a "republican form of government," and that any amendments to the Puerto Rico Constitution are subject to the United States Constitution. *See* 48 U.S.C. § 731c and Pub.L. 447, 66 Stat. 327 (1952).

It is ironic, in this light, that the PDP attempts to derive comfort from its lengthy discussion (at 21-23) of the 1964 change in the Puerto Rico Constitution that permitted the legislature to adopt the "party ownership" statute at issue here. Far more relevant is the fact that, when Congress authorized the formulation of a constitution for Puerto Rico which comported with the United States Constitution and preserved the republican form of government, the Constitution submitted for approval provided, as the PDP concedes, for open by-elections to fill legislative vacancies (except when a general election was imminent). It was that system that Congress approved in 1952 as complying with the United States Constitution and as assuring the "republican form of government." Moreover, the joint resolution approving that constitution expressly stipulated that any amendments would have to be subject to the United States Constitution. *See* Pub. L. 447, 66 Stat. 327 (1952).

Thus, the 1964 amendment to the Puerto Rico Constitution, which retrenched from this protection of the franchise of all voters, no more immunizes the "party ownership" statute

passed under it than would a similar State constitutional provision free a State legislature from observing federal constitutional principles.

IV. THIS CASE POSES NO THREAT OF DISRUPTION OF "GOVERNMENTAL STRUCTURES."

In a final *in terrorem* passage, the PDP asserts that acceptance of appellants' arguments would invalidate every statute in the country that authorizes appointment of successors to vacant offices, including executive posts, school boards, and the like. This contention is overblown. The questions posed by this case focus solely on the permissible mechanisms that may be used for selecting members of legislatures exercising general law-making powers. Nothing in appellants' arguments extends beyond this focus to suggest that other officials must be elected rather than appointed or that political parties may not be given greater responsibility in filling executive or administrative posts.

The case is important, however, because a significant minority of the States provide for some sort of appointment to fill legislative vacancies, and fourteen States apparently sanction some variant of the "party ownership" concept. Far from providing a reason for this Court to turn its back on this appeal, these facts demonstrate why, at the very least, probable jurisdiction should be noted, so that the Court can determine whether the type of provision at issue here is trenching upon the constitutional rights of American citizens, not only in Puerto Rico, but in a number of States of the Union.

CONCLUSION

The motion to dismiss should be denied. The judgment below should be summarily reversed, or probable jurisdiction should be noted.

Respectfully submitted.

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Appellant's Brief

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No. 81-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JESUS RIVERA RODRIGUEZ, *et al.*,

Appellants

v.

POPULAR DEMOCRATIC PARTY, *et al.*,

Appellees

On Appeal from the Supreme Court of Puerto Rico

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. Whether a statute providing for the filling of a vacancy in a legislative seat by appointment rather than by an open election, even when the vacancy spans almost the full four-year term of office, (a) abridges the constitutional right of qualified electors to vote for their representative in a general legislature and (b) denies them the equal protection of the laws.

2. Whether a statute adopting the theory that the seat of a legislator elected to represent the people of a particular district "belongs to the political party" of that legislator in the event of a vacancy, so that only members of that party are eligible to participate in filling the vacancy, (a) violates the freedom of political association of members of other parties and (b) denies them the equal protection of the laws.*

---

* Appellants are the following qualified voters who reside in Representative District No. 31 of Puerto Rico, and who are not affiliated with appellee Popular Democratic Party: Jesus Rivera Rodriguez, Fundador Diaz Cruz, Margot Lopez Batalla, Inocencio Quintero Rivera, Santos Reyes Reyes, Antonio Rivera Carrasquillo, Heriberto Mendez Velazguez, Sergio Rivera Rodriguez, Hector Bermudez Alicia and Roberto Ortiz Hernandez.

Appellees are the Popular Democratic Party (one of the political parties in Puerto Rico), Carlos Romero Barcelo (the Governor of Puerto Rico), and Gerineldo Barreto Perez (the Administrator of Elections of Puerto Rico).

In the courts below, the appellee Governor and the appellee Elections Administrator were aligned with appellants.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT	2
1. The Legislative Vacancy	3
2. Proceedings in the Superior Court	4
3. Review by the Supreme Court of Puerto Rico	4
4. The PDP's Selection of the New Representative	5
SUMMARY OF ARGUMENT	6
ARGUMENT	10
I. FEDERAL CONSTITUTIONAL PROTECTIONS OF VOTING RIGHTS APPLY WITH FULL FORCE IN PUERTO RICO	10
II. QUALIFIED VOTERS HAVE A CONSTITUTIONAL RIGHT TO ELECT REPRESENTATIVES IN LEGISLATURES EXERCISING GENERAL, STATEWIDE LAWMAKING POWER	14
A. This Court Has Effectively Recognized The Constitutional Right Of Qualified Voters To Elect Their State Representatives	15
B. It Is Implicit In The Text Of The Constitution That State Representatives Must Be Elected	17
C. History Confirms That State Legislators Necessarily Occupy Positions That Must Be Elective	19

PAGE

D. The Constitution Establishes A Right To Vote To Fill Legislative Vacancies 21

III. APPOINTMENTS TO FILL LEGISLATIVE VACANCIES VIOLATE THE CONSTITUTIONAL RIGHT OF THE QUALIFIED VOTERS OF EACH LEGISLATIVE DISTRICT TO PARTICIPATE EQUALLY IN THE POLITICAL PROCESS 24

IV. EXCLUSIVE CONTROL OF APPOINTMENTS TO FILL LEGISLATIVE VACANCIES MAY NOT BE VESTED IN A POLITICAL PARTY 26

A. The "Party Ownership" Feature Of The Puerto Rico Electoral Law Abridges The First Amendment Rights Of Voters Who Are Not Members Of The Favored Party 27

B. The "Party Ownership" Theory Is Also Offensive To Basic Principles Of Equal Protection 29

V. THE BURDENS ON APPELLANTS' CONSTITUTIONAL RIGHTS CANNOT SURVIVE THE CONSTITUTIONALLY REQUIRED STANDARD OF STRICT SCRUTINY 32

A. The Puerto Rico Election Laws Are Subject To Strict Scrutiny 32

B. Experience Undermines Any Claim That Articles 5.006 And 5.007 Are Necessary To Serve Some Compelling Governmental Interest 33

C. The Putative Governmental Interests Suggested By The Court Below Do Not Sustain The Puerto Rico Election Laws 35

1. "Reduction of Inter-Partisan Political Campaigns" 35

2. "Stability of Governmental Structures" ... 37

PAGE

3. "No Changes in the Legislative Balance" and "Protection of the Electoral Mandate" 38

CONCLUSION 42

APPENDICES

APPENDIX I: Constitutional Provisions Regulating the Vacancies in State Lower Legislative Houses at the Time of Admission to the Union (Covering States Admitted Through 1868) A-1

APPENDIX II: Congressmen in the 20th Century Serving Under Multiple Political Parties A-4

APPENDIX III: Post-Election Changes of Puerto Rico Representatives and Senators from One Political Party to Another.. A-8

APPENDIX IV: State Constitutional Provisions Requiring an Elected Legislative House as of 1787 ..... A-9

TABLE OF AUTHORITIES

CASES:	PAGE
Baker v. Carr, 369 U.S. 186 (1962)	18
Ball v. James, ___ U.S. ___, 68 L.Ed.2d 1[illegible] (1981)	16,17
Board of Education v. Barnett, 319 U.S. 624 (1943)	29
Bond v. Floyd, 385 U.S. 116 (1966)	26
Branti v. Finkel, 445 U.S. 507 (1980)	29
Buckley v. Valeo, 424 U.S. 1 (1976)	36
Bullock v. Carter, 405 U.S. 134 (1972)	32,36
Carey v. Population Services International, 431 U.S. 678 (1977)	36
Carrington v. Rash, 380 U.S. 89 (1965)	27,34,36
City of Mobile v. Bolden, 446 U.S. 55 (1980)	32
City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970)	34
Democratic Party of the United States v. LaFollette, 449 U.S. 897 (1981)	40
Duncan v. McCall, 139 U.S. 449 (1891)	18
Dunn v. Blumstein, 405 U.S. 330 (1972)	25,27,32, 34
Elrod v. Burns, 427 U.S. 347 (1976)	29,39
Evans v. Cornman, 398 U.S. 419 (1970)	15,34
Examining Board v. Flores de Otero, 426 U.S. 572 (1976)	14
Fortson v. Morris, 385 U.S. 231 (1966)	15
Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)	14
Harman v. Forssenius, 380 U.S. 528 (1965)	34
Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966)	17,18
Hill v. Stone, 421 U.S. 389 (1975)	30,34
Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978)	16,17
Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979)	32
Jackson v. Ogilvie, 426 F.2d 1333 (7th Cir.), *cert. denied*, 400 U.S. 833 (1970)	21

CASES:	PAGE
Jenness v. Fortson, 403 U.S. 431 (1971)	38
Kaelin v. Warden, 334 F. Supp. 602 (E.D. Pa. 1971)	30,31
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	27
Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969)	15,24,29
Kusper v. Pontikes, 414 U.S. 51 (1973)	32
McDaniel v. Paty, 435 U.S. 618 (1978)	28
McPherson v. Blacker, 146 U.S. 1 (1892)	24
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	36
Minor v. Happersett, 21 Wall. 162 (1875)	14,18,20
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971)	37
NAACP v. Button, 371 U.S. 415 (1963)	33
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	37
Opinion of the Justices, 20 Mass. 546 (1826)	23
Patterson v. Burns, 327 F. Supp. 245 (D. Hawaii, 1971)	31
Perry v. Sinderman, 408 U.S. 593 (1972)	27
Powell v. McCormack, 395 U.S. 486 (1969)	19
Puerto Rico Socialist Party v. Commonwealth Election Commission, __ P.R. __, 80 J.T.S. 92 (December 2, 1980)	40
Reynolds v. Sims, 377 U.S. 533 (1964)	*passim*
Rosario v. Rockefeller, 410 U.S. 752 (1973)	29
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	15,32
Smith v. Allwright, 321 U.S. 649 (1944)	28

CASES:	PAGE
Stanley v. Illinois, 405 U.S. 645 (1972)	36
Storer v. Brown, 415 U.S. 724 (1974)	38
Terry v. Adams, 345 U.S. 461 (1953)	28
Torres v. Puerto Rico, 442 U.S. 465 (1979)	2,13,14
United Public Workers v. Mitchell, 330 U.S. 75 (1947)	28
United States v. Robel, 389 U.S. 258 (1967)	27
Valenti v. Rockefeller, 292 F. Supp. 851 (S.D.N.Y. 1968), *aff'd per curiam*, 393 U.S. 405 (1969)	22,23,24
Wesberry v. Sanders, 376 U.S. 1 (1964)	15,19
Whitney v. California, 274 U.S. 357 (1927)	39
Williams v. Rhodes, 393 U.S. 23 (1968)	*passim*
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	36

UNITED STATES STATUTES AND TREATIES:	
28 U.S.C. §§ 1257, 1258(2)	2,13
8 U.S.C. § 1402	12
The Foraker Act, 31 Stat. 77 (1900)	10
Northwest Ordinance of 1787, § 10	21
Organic Act of 1917, 39 Stat. 951, 48 U.S.C. §§ 731 *et seq*	10
Treaty of Paris, Article IX, 30 Stat. 1754 (1899); T.S. No. 343	10
Puerto Rico Constitution Approval Act of July 3, 1952, Pub.L. 447, 66 Stat. 327 (1952)	11,13
Puerto Rico Federal Relations Act, Public Law 600, 64 Stat. 319, 48 U.S.C. §§ 731b-731e (1950)	10,12,13
Puerto Rico Federal Relations Act, 48 U.S.C. § 733b note	10

PUERTO RICO STATUTES:	PAGE
Electoral Law of Puerto Rico	
Article 5.006, 16 L.P.R.A. § 3206	*passim*
Article 5.007, 16 L.P.R.A. § 3207	*passim*

BRITISH STATUTES:	
8 Geo. II c.30 (1735)	19
10 Geo. III c.16 (1769)	19
10 Geo. III c.41 (1769)	21
11 Geo. III c.42 (1770)	19
15 Geo. III c.36 (1775)	21
23 Hen. VI c.15 (1444)	19
The Statute of Westminster, 3 Edw. I c.5 (1275)	19
2 W.& M. c.7 (1689)	19
7 & 8 Will. III c.7 (1696)	19
7 & 8 Will. III c.25 (1696)	19
10 & 11 Will. III c.7 (1699)	19

UNITED STATES CONSTITUTION:	
Article I, § 2,	17,21
Article I, § 3	22
Article IV, § 4	18
Amendment I	27,28
Amendment XIV	*passim*
Amendment XV	17

UNITED STATES CONSTITUTION:	PAGE
Amendment XVII	17,21
Amendment XIX	17
Amendment XXIV	17
Amendment XXVI	17

PUERTO RICO CONSTITUTION:	
Preamble	12
Article I, § 2	3
Article II, § 2	12
Article III, § 1	3,12
Article III, § 8	13

STATE CONSTITUTIONS:	
Georgia Const. of 1777, Art. II	22
N.J. Const. of 1776, § 3	22
N.J. Const. of 1844, Art. IV, § 4	23
N.Y. Const. of 1777, § 4	22
N.Y. Const. of 1846, Art. X, § 5; Art. III, § 2	23
Penn. Const. of 1776, § 9	22
Penn. Const. of 1790, Art. I, § 19	23
Penn. Const., Art. 5, § 13	31
R.I. Const. of 1842, Art. VIII, § 9	23
S.C. Const. of 1778, Art. XII	22
Vt. Const. of 1793, Ch. 2, § 8	23

LEGISLATIVE MATERIALS: PAGE

98 Cong. Rec. 6167, 6180, 6182, 6184 (1952) 11

Hearings Before the Senate Committee on Interior and Insular Affairs on S.J. Res. 151, 82d Cong., 2d Sess. (1952) 11

H.R. Rep. No. 368, 52nd Cong. 1st Sess. (1892) 22

S. Rep. No. 1720, 82d Cong. 2d Sess. (1952) 11

BOOKS, ARTICLES AND MISCELLANEOUS:

132 A.L.R. 574 (1941) 24

Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) 20

Beyle & Dalton, *Appointment Power: Does It Belong to the Governor?*, 54 State Government 2 (1981) 31

Blackstone, COMMENTARIES * 19,21

Cabranes, *The Status of Puerto Rico*, 16 Int. & Comp. L.Q. 531 (1967) 11

Camaur, *The Feasibility of an Identifiable Role for Puerto Rico in Foreign Affairs*, 42 Geo. Wash. L. Rev. 798 (1974) 11

Comptroller General, Report to Congress, *Puerto Rico's Political Future: A Divisive Issue with Many Dimensions* 14 (1981) 11

Connable & Silberfarb, TIGERS OF TAMMANY (1967) 31

Declaration of Independence 19,20

El Nuevo Dia, March 23, 1981, at 3 6

The Federalist, No. 9 (New American Library Ed. 1961) ... 18

The Federalist, No. 10 18

The Federalist, No. 39 18

BOOKS, ARTICLES AND MISCELLANEOUS:	PAGE
The Federalist, No. 52	18,20
Lacovara, *The Authority of the Commonwealth of Puerto Rico under the United States Constitution to Join International Organizations and to Enter into International Agreements*, 11 Revista Juridica de la Universidad Interamericana de Puerto Rico 449 (1977)	11
Leibowitz, *Colonial Emancipation in the Caribbean: A Legal and Political Analysis of the Status of Puerto Rico*, 11 Revista Juridica de la Universidad Interamericana de Puerto Rico 467 (1977)	11
Lowi, AT THE PLEASURE OF THE MAYOR (1964)	31
Madison, *Notes on the Constitutional Convention*, in I Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1927)	17,18
Muchmore & Beyle, *The Governor as Party Leader*, 53 State Government 121 (1980)	31
Plumb, THE GROWTH OF POLITICAL STABILITY IN ENGLAND 1675-1725 (Penguin ed. 1975)	22
Swindler, ed., SOURCES AND DOCUMENTS OF THE UNITED STATES CONSTITUTIONS (1973)	22
Tribe, AMERICAN CONSTITUTIONAL LAW (1978)	39
Woods, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969)	20

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-328

JESUS RIVERA RODRIGUEZ, *et al.*,

Appellants

v.

POPULAR DEMOCRATIC PARTY, *et al.*,

Appellees

On Appeal from the Supreme Court of Puerto Rico

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion and judgment of the Superior Court of Puerto Rico (J.S. App. 1a-36a) and the *per curiam*, concurring, and dissenting opinions (J.S. App. 1b-33b) and judgment (J.S. App. C) of the Supreme Court of Puerto Rico are not yet officially reported. The Supreme Court decision is unofficially reported at 81 J.T.S. 41.

JURISDICTION

On May 8, 1981, the Supreme Court of Puerto Rico entered the judgment appealed from (J.S. App. C). The court's accompanying *per curiam* opinion expressly upheld

the validity of Articles 5.006 and 5.007 of the Electoral Law of Puerto Rico, 16 L.P.R.A. §§ 3206, 3207, as construed by the court, against the federal constitutional challenges made by appellants (J.S. App. 13b-15b). Appellants filed a timely motion for reconsideration on May 22, 1981, reiterating their constitutional objections. A timely motion for reconsideration had also been filed by the appellee Governor of Puerto Rico on May 14, 1981. Both motions were denied on May 27, 1981 (J.S. App. D). On May 28, 1981, appellants filed with the court below a notice of appeal to this Court (J.S. App. E).

Under 28 U.S.C. § 1258(2), the Court has jurisdiction to review by appeal a final judgment of the Supreme Court of Puerto Rico that sustains the validity of a statute of Puerto Rico against the claim that the statute is repugnant to the United States Constitution. *See, e.g., Torres v. Puerto Rico,* 442 U.S. 465, 468 (1979).

STATUTES INVOLVED

Articles 5.006 and 5.007 of the Electoral Law of Puerto Rico, 16 L.P.R.A. §§ 3206, 3207, are set out in Appendix F to the Jurisdictional Statement.

STATEMENT

In this case the Supreme Court of Puerto Rico has upheld the constitutionality of a Puerto Rico statute that confers the "ownership" of a seat in the general legislature on the political party to which the incumbent belongs. As construed and upheld by the court below, the statute vests the party, acting through its leadership or its membership, with the exclusive right to fill the seat in the event of a vacancy.

1. The Legislative Vacancy. As in the rest of the United States, there are two major political parties in Puerto Rico; in Puerto Rico these are the appellee Popular Democratic Party ("PDP") and the New Progressive Party. At the general election on November 4, 1980, Ramon Muniz, a member of the PDP, won the contested election to represent the people of District 31 in the House of Representatives, one of the two houses of the Puerto Rico Legislative Assembly. The Assembly exercises general legislative authority throughout Puerto Rico. P.R. Const. Art. I, § 2; Art. III, § 1. Representative Muniz's slim margin of victory depended on votes from people who did not vote a straight party-line ticket for the PDP.[1] Unfortunately, Representative Muniz died on January 28, 1981, with almost the full four years remaining in his term of office.

The following month, invoking Articles 5.006 and 5.007 of the Electoral Law of Puerto Rico, 16 L.P.R.A. §§ 3206, 3207, the Governor called a by-election to fill the vacancy caused by the death of Representative Muniz. The Governor's call for the election specified that all qualified electors in Representative District 31 were entitled to vote in the by-election (Jt. App. 23-25). The PDP, however, of which Representative Muniz had been a member, was to be the only political party permitted to nominate candidates to run. Other candidates were to be permitted to run as "independents."

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[1] If only the "straight" (party-line) ballots had been considered, Rep. Muniz would have lost the election. His winning plurality resulted from votes cast for him by electors who did not vote a straight party-line ticket. The figures are detailed in the Superior Court's opinion (J.S. App. 32a).

2. Proceedings in the Superior Court. On March 3, 1981, the PDP filed the present action in the Superior Court of Puerto Rico, seeking declaratory and injunctive relief against the Governor and the General Administrator of Elections. The PDP asked the Superior Court to interpret Articles 5.006 and 5.007 of the Electoral Law as barring any person not affiliated with the PDP from participating in the by-election as a candidate or a voter (Jt. App. 1-6). On March 6, 1981, appellants intervened as defendants, stating that each of them is a qualified elector in District 31 and that none of them is a member of the PDP (Jt. App. 43).

The Governor and appellants argued that the restraints sought by the PDP, if granted, would violate the federal constitutional rights of voters not affiliated with the PDP. In addition, appellants took issue with the Governor's position that the Electoral Law could constitutionally be construed as prohibiting parties other than the PDP from entering their own candidates in the by-election (Jt. App. 43-45). On March 20, 1981, however, the Superior Court entered judgment (J.S. App. A), granting members of the PDP the exclusive right to participate in the by-election.

3. Review by the Supreme Court of Puerto Rico. Both the Governor and the appellants secured review by the Supreme Court of Puerto Rico and raised their federal constitutional arguments. In a *per curiam* opinion dated May 8, 1981, accompanied by four concurring or dissenting opinions (J.S. App. B), the Supreme Court of Puerto Rico modified the judgment.

The court interpreted Articles 5.006 and 5.007 as conferring on the party of the deceased legislator the exclusive prerogative to choose his replacement. If that party selects a single candidate within 60 days of the vacancy, the court ruled, its candidate is deemed "automatically elected to fill the vacancy" without any

election at all (J.S. App. 6b). In selecting the new Representative, the party may use any mechanism considered appropriate, including the one followed here: a primary election in which only candidates from the party of the deceased legislator may run and only members of that party may vote (J.S. App. 4b-6b). In holding that selection of a legislative successor may constitutionally be limited to candidates and voters who are members of the same party as that of the deceased legislator, the court reasoned that, under the Electoral Law, the vacant seat "belongs to the party who nominated the legislator" who died (J.S. App. 14b).

The court expressly rejected the federal constitutional challenges to the Electoral Law as so construed (J.S. App. 13b-15b). In doing so, the court concluded that there is no constitutionally protected right to vote to fill vacancies in a general legislature and that there are adequate reasons to exclude from the process all voters and candidates not affiliated with the political party that "owns" the seat in the House of Representatives.[2]

4. The PDP's Selection of the New Representative. While the case was before the courts below, the PDP proceeded to hold a primary election in which only its members were permitted to participate.[3] From a field of four PDP candidates, the party members on March 22, 1981, selected Juan Corujo Collazo as the PDP's choice to fill the vacancy. Although over 40,000 voters had participated in the open election that had resulted in the late

[2] The court suggested that two situations could arise in which all the electors of a district could have the opportunity to vote in a by-election to select a successor Representative (J.S. App. 15b). Neither of the unrealistic possibilities suggested occurred in this case.

[3] In accordance with the Governor's original call, at least one candidate not affiliated with the PDP had filed a petition with the Election Commission seeking to run in the aborted by-election as an "independent" (Jt. App. 51-52).

Representative Muniz's victory (J.S. App. 32a), only 5,039 PDP members turned out to choose his successor. Mr. Corujo won the primary with a total of 2,315 votes. *See El Nuevo Dia,* March 23, 1981, at 3.

On June 29, 1981, this Court denied appellants' application to extend a stay of mandate that had been granted by the Supreme Court of Puerto Rico. As a result, on July 6, 1981, in accordance with the mandate of the court below deeming Mr. Corujo "automatically elected" (J.S. App. 6b), the candidate chosen solely by the PDP was sworn in as the new Representative of all of the people of District 31 for the next three and one-half years.

SUMMARY OF ARGUMENT

I.

The citizens of Puerto Rico are citizens of the United States entitled to the same protection of their electoral rights under the United States Constitution as are citizens living in the States of the Union. Congress has exerted its full power to assure that Puerto Rico adheres to a republican form of government and otherwise observes the fundamental principles of the United States Constitution. Moreover, this Court has repeatedly acted to enforce the same basic constitutional guarantees that are at issue in this case in order to protect the people of Puerto Rico.

II.

A. This Court has affirmed the principle that, under our representative form of government, members of the State legislature must be elected by the voters of the State. Since this is a continuing right and since State legislatures are to be responsive to the public will, qualified voters are entitled to have the opportunity to express their current preference when a legislative vacancy occurs.

B. No right is more often mentioned, or surrounded with greater protection in the Constitution, than the franchise. Several provisions of the Constitution assume that at least one chamber of each State's legislature must be popularly elected.

C. Constitutional history also leaves no room for doubt that State legislators necessarily occupy elective positions. The right to vote for members of the British House of Commons had been established for centuries before the Revolution. Indeed, the Founding Fathers embarked on the Revolution in part because the British frustrated direct electoral representation of the colonists. The constitutions of each of the original States that entered the Union similarly provided for at least one popularly elected branch of the legislature, and no State has ever departed from this form of government.

D. The Constitution and our constitutional history also reveal the understanding of the Framers that, at least in the absence of compelling reasons to do otherwise, legislative vacancies must be filled by popular election, even in mid term. This is precisely what the British provided, what Congress insisted upon under the Articles of Confederation, and what the Constitution adopted for legislative vacancies. Special elections are also what virtually every State up through the adoption of the Fourteenth Amendment in 1868 expressly required for the replacement of elected State representatives, even when the normal term of office was only one year. This consistent practice reflects an understanding that there is a basic constitutional right to have legislative vacancies filled by popular election.

III.

The Puerto Rico appointment scheme also violates the constitutional right of the qualified voters of District 31 to participate equally in the political process. Unlike the residents of every other legislative district in Puerto Rico,

appellants and the other qualified voters of District 31 are to be "represented" for almost four years by a legislator who has been appointed, not elected. Elementary notions of equal protection prohibit creation of a legislative system in which some districts elect their representatives, while others have "representatives" appointed on their behalf.

IV.

By vesting exclusive power to appoint a successor legislator in a political party, the Puerto Rico Electoral Law excludes some qualified voters within the legislative district from having any voice in the selection of their representative, solely because of their political affiliation. Exclusion from the process of choosing a State representative because of political philosophy and party membership is inconsistent with both (A) the First Amendment freedoms of political association and belief and (B) the equal protection of the laws guaranteed to the members of the non-favored party.

V.

Finally, the burdens on appellants' constitutional rights created by the Puerto Rico Electoral Law are not necessary to serve any compelling governmental interest.

A. The Puerto Rico statute is subject to strict scrutiny because it creates suspect classifications and impinges on constitutionally protected rights. The statute withholds a constitutionally protected benefit (the franchise) on a constitutionally suspect ground (lack of membership in the "right" political party).

B. Contrary federal and State practice, providing for by-elections to fill legislative vacancies, makes any claim of a compelling justification for party appointments implausible on its face. There is no evidence of any disruption or political turmoil resulting from this long-standing and widespread recognition of the need to

protect the voting rights of all citizens. Indeed, even Puerto Rico's own Electoral Law implicitly concedes the feasibility of contested elections to fill legislative vacancies by providing for by-elections in several circumstances.

C. The various "compelling" interests to which the court below alluded dissolve upon analysis.

1. Any interest in reducing the number of political campaigns to avoid administrative burdens and costs cannot justify the Electoral Law. Nor does Puerto Rico have any legitimate authority to "protect" political parties from the costs that they may choose to incur in election campaigns. Finally, any goal that Puerto Rico might have of keeping the strains of political debate confined to general elections impermissibly frustrates fundamental freedoms of speech and association.

2. Promoting the "stability" of a State's political system cannot justify freezing the political *status quo* by granting a party "ownership" of a legislative seat, despite the preferences of the electorate. Our system of representative democracy is founded on the belief that the electoral process enhances political stability. An attempt to impose order through single party control in defiance of the electoral process is a perversion of that system.

3. Preservation of the "legislative balance" and perpetuation of the "electoral mandate" of a political party epitomize goals that are hostile to our Constitution. The preservation of party power cannot be erected as a bar to political change desired by the electorate. Although political parties play a constitutionally protected role in fielding candidates for public office, they do so only in service of the rights of individual voters. Legislators are necessarily elected by and represent the individual citizens of their districts, not political parties. As a result, if individual voters are unwilling to elect a candidate of the same party as that of his predecessor, there is no legitimate, much less compelling, interest in frustrating the majority's current will.

ARGUMENT

I. FEDERAL CONSTITUTIONAL PROTECTIONS OF VOTING RIGHTS APPLY WITH FULL FORCE IN PUERTO RICO.

It is important to recognize at the threshold that the citizens of Puerto Rico are entitled to the same protection of their electoral rights under the United States Constitution as are citizens living in the States of the Union.

1. Under the treaty ending the war with Spain, which ceded Puerto Rico to the United States, Congress was explicitly granted the right to determine the "civil rights and political status of the native inhabitants . . . ." Art. IX, 30 Stat. 1754, 1759 (1899); T.S. No. 343, at 10. From the outset, Congress acted to recognize the constitutional rights of the inhabitants of Puerto Rico. Thus, the Foraker Act, which Congress passed soon after the Treaty of Paris was signed, bound the officials of Puerto Rico to follow the Constitution and laws of the United States. 31 Stat. 77, §§ 14, 16 (1900). The Organic Act of 1917, 39 Stat. 951, which superseded the Foraker Act, then declared all inhabitants of Puerto Rico, with certain minor exceptions, to be citizens of the United States. *See* 48 U.S.C. A. § 733b note.

2. Puerto Rico's political and constitutional evolution reached its present stage under the 1950-1952 "Compact" between the people of Puerto Rico and the United States Congress. That Compact, initiated by Congress through Public Law 600, provided for the organization of a constitutional government by the people of Puerto Rico.[4]

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[4] On July 3, 1950, the President approved Public Law 600, which offered Puerto Rico "a compact so that the people of Puerto Rico . . . [could] organize a government pursuant to a constitution of their own adoption." 64 Stat. 319, 48 U.S.C §§ 731b-731e. The voters of Puerto Rico approved the Compact on June 4, 1951. A constitutional convention was then convened, and a constitution drafted. The

(Footnote continued on next page)

Under the Compact, certain fundamental judgments were made about the status of Puerto Rico and about the rights of its citizens.

As a matter of political sovereignty, Puerto Rico acquired a unique status that has been termed neither full statehood nor independence.[5] Under constitutional provisions "adopted directly from the U.S. and state constitutions," Puerto Rico now "exercises virtually the same control over its internal affairs as the States." Comptroller General, Report to the Congress, *Puerto Rico's Political Future: A Divisive Issue with Many Dimensions* 14 (1981). Technically, however, Puerto Rico is not one of the States of the Union. Thus, there exists room to debate whether federal constitutional limitations on the sovereign powers of States—for example, those governing State involvement in international affairs—apply with equal measure to Puerto Rico.[6]

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people of Puerto Rico ratified this constitution on March 3, 1952. The President submitted the Puerto Rico constitution to Congress, which, with amendments, approved it by Joint Resolution on July 3, 1952. H. J. Res. 430, 66 Stat. 327. The Governor of Puerto Rico declared this new constitution to be in force on July 25, 1952.

[5] *See, e.g.*, Hearings Before the Senate Committee on Interior and Insular Affairs on S. J. Res. 151, 82d Cong., 2d Sess. 13 (1952); S. Rep. No. 1720, 82d Cong., 2d Sess. 6-7 (1952); 98 Cong. Rec. 6167, 6180, 6182, 6184 (1952).

[6] *Compare* Leibowitz, *Colonial Emancipation in the Caribbean: A Legal and Political Analysis of the Status of Puerto Rico*, 11 Revista Juridica de la Universidad Interamericana de Puerto Rico 647, 670-71 (1977), Lacovara, *The Authority of the Commonwealth of Puerto Rico Under the United States Constitution to Join International Organizations and to Enter into International Agreements*, 11 Revista Juridica de la Universidad Interamericana de Puerto Rico 449 (1977), *with* Camaur, *The Feasibility of an Identifiable Role for Puerto Rico in Foreign Affairs*, 42 Geo. Wash. L. Rev. 798 (1974). *See generally* Cabranes, *The Status of Puerto Rico*, 16 Int. & Comp. L.Q. 531 (1967).

By contrast, there is no similar uncertainty about the application of federal constitutional guarantees that govern the relationship between Puerto Rico and its citizens. Both Congress and this Court have conclusively settled that the same constitutional protections of individual rights and liberties that apply within the States of the Union apply within Puerto Rico.

3. As the relationship between Puerto Rico and the United States has now evolved, the citizens of Puerto Rico are citizens of the United States who acquire that citizenship at birth. 8 U.S.C. § 1402. In authorizing the people of Puerto Rico to adopt a constitution, subject to congressional approval, Congress stipulated that that constitution must contain a bill of rights and that it must establish a republican form of government. 48 U.S.C. § 731c. The Puerto Rico Constitution, approved both by Congress and by the people of Puerto Rico, expressly declares in its Preamble that Puerto Rico is engaged in "permanent union" with the United States and that one of the "determining factors" in the union is "our loyalty to the principles of the Federal Constitution."

The constitution framed by the people of Puerto Rico carefully responds to congressional insistence that the new constitution comport with the United States Constitution by guaranteeing personal liberties and a republican form of government. The new constitution affirmed the principle that the government must reflect "the will of the people" expressed through "equal, direct and secret universal suffrage . . . " (Art. II, § 2). All legislative power is vested in a bicameral Legislative Assembly "whose members shall be elected by direct vote at each general election" (Art. III, § 1).

Most pointedly, the constitution stipulated—originally—that any vacancies (except those occurring near the next general election) were to be filled by "a

special election in said district . . ." (Art. III, § 8). It was the amendment of this provision in 1964 that helped give rise to this case. *See* p. 14, *infra*. But it was also this original constitution that the President and the Congress accepted as conforming with the requirements of Public Law 600 in protecting federal constitutional rights. Furthermore, in approving the Puerto Rico Constitution, Congress insisted—and the people of Puerto Rico readily agreed—that the proposed constitution be specifically modified to provide that "any amendment or revision of this constitution shall be consistent with . . . the Constitution of the United States." *See* Pub. L. 447, 66 Stat. 327 (1952).

Thus, Congress has exerted its full power to assure that the people of Puerto Rico enjoy the same political and civil liberties under the United States Constitution as do other American citizens living within the States. Congress has also seen to it that the people of Puerto Rico have equal access to the federal courts in order to protect the federal constitutional rights secured to them under the Compact. For example, this Court's jurisdiction over the decisions of the Supreme Court of Puerto Rico in cases involving the validity of Puerto Rico statutes under the United States Constitution is identical to its jurisdiction over State supreme courts when similar questions are raised. *Compare* 28 U.S.C. § 1257 *with* 28 U.S.C. § 1258.

4. For its part, this Court has vigorously enforced the fundamental guarantees of our Constitution in favor of the people of Puerto Rico.[7] This protection, similar to the protection afforded by the Constitution to all other American citizens, applies without regard to Puerto Rico's

[7] *See, e.g., Torres v. Puerto Rico*, 442 U.S. 465, 469–70 (1979): "[T]his Court has held or otherwise indicated that Puerto Rico is subject to the First Amendment Speech Clause . . .; the Due Process Clause of either the Fifth or the Fourteenth Amendment . . .; and the equal protection guarantee of either the Fifth or the Fourteenth Amendment . . . ."

precise status for other purposes. *See, e.g., Torres v. Puerto Rico, supra,* 442 U.S. at 471 (majority opinion), 475-76 (opinion of Brennan, Stewart, Marshall, and Blackmun, JJ., concurring in judgment); *Examining Board v. Flores de Otero,* 426 U.S. 572, 601 (1976). *See also Hampton v. Mow Sun Wong,* 426 U.S. 88, 100 (1976).

5. The issue now before the Court arises because in 1964 Puerto Rico amended its constitution to delete the original requirement of open by-elections to fill legislative vacancies. Under the present provision, the Legislative Assembly is authorized to provide "by law" for the filling of vacancies. Under that new grant of authority, the legislature enacted Articles 5.006 and 5.007 of the Electoral Law, which, as construed by the court below, transfer exclusive control of the selection of a successor legislator from the electorate to a single party. This system, we submit, impermissibly trenches upon federally guaranteed constitutional rights.

II. QUALIFIED VOTERS HAVE A CONSTITUTIONAL RIGHT TO ELECT REPRESENTATIVES IN LEGISLATURES EXERCISING GENERAL, STATEWIDE LAWMAKING POWER.

In this case, the Puerto Rico Supreme Court has held that a public office may be filled by appointment by a political party, through any mechanisms the party chooses, even though the office is a seat in a general legislature and the remaining term of office is almost a full four years. In reaching this result, the court reasoned that the citizens of the States have no constitutional right to vote in these circumstances and, therefore, neither do the people of Puerto Rico. *See* J.S. App. 13b-14b & n.5.

The court's major premise, however, is fatally defective. Although the Constitution "does not confer the right of suffrage upon any one," *Minor v. Happersett,* 21 Wall.

162, 178 (1875); *see San Antonio Independent School District v. Rodriquez,* 411 U.S. 1, 35 n.78 (1973), this means only that no individual necessarily has a right to vote and that the States (and Puerto Rico) enjoy a certain amount of latitude in determining the qualifications of voters. Once the States (and Puerto Rico) have established voter qualifications, however, qualified electors—such as appellants—*are* constitutionally entitled to elect their State representatives, not only in general elections but in by-elections as well.

A. This Court Has Effectively Recognized The Constitutional Right Of Qualified Voters To Elect Their State Representatives.

This Court has frequently acknowledged the transcendent importance of the right to vote for members of the legislature. As "the citizen's link to his laws and government," *Evans v. Cornman,* 398 U.S. 419, 422 (1970), the right to vote establishes "the legitimacy of representative government," *Kramer v. Union Free School District No. 15,* 395 U.S. 621, 626 (1969), and "is protective of all fundamental rights and privileges," *Evans v. Cornman, supra,* 398 U.S. at 422. Indeed, all other rights "are illusory if the right to vote is undermined." *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964).

This Court, however, has never before had occasion to rule directly whether State legislators may be appointed instead of elected. Nonetheless, it has been safely assumed that the Court:

> "would *not* rule that the Federal Constitution would tolerate a state constitutional provision that would enable the Governor to appoint the legislature — or to appoint any legislators for election districts if no candidate received a majority of the votes . . . ." *Fortson v. Morris,* 385 U.S. 231, 246 (1966) (Fortas, J., dissenting)(emphasis added).

The Court's seminal decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), necessarily precludes the appointment of State legislators, at least in the absence of compelling governmental reasons for bypassing elections. In *Reynolds* the Court stated unequivocally: "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." 377 U.S. at 554. The Court reasoned that our form of government—"representative government"—"is in essence self-government through the medium of elected representatives of the people . . . ." *Id.* at 565. And since State legislatures are "the fountainhead of representative government in this country," *id.* at 564, the "right to vote freely for the candidate of one's choice" applies to the selection of State legislators. *Id.* at 555. Thus, each qualified citizen "has an inalienable right to full and effective participation in the political processes of his State's legislative bodies" through the franchise. *Id.* at 565.

A statute that eliminates the franchise—even in the case of the choice of a legislative successor—trenches on this fundamental right. As the Court stated in *Reynolds*, legislatures are to be "responsive to the popular will." 377 U.S. at 565. This requirement of responsiveness demands that the voters have the opportunity to express their *current* preference when a legislative vacancy occurs, especially when, as here, essentially a full four-year term is to be filled. The easy acceptance by the court below of appointments to the legislature is thus sharply at odds with the language and reasoning of *Reynolds* and its progeny.[8]

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[8] Later decisions expressly assume the existence of a freely elected—and hence responsive—general State legislature from which those adversely affected by the distribution of the franchise in a local

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B. It Is Implicit In The Text Of The Constitution That State Representatives Must Be Elected.

1. The principles so forcefully expressed in these cases are firmly rooted in the Constitution. Indeed, no right is more frequently mentioned, or surrounded with greater protection in the Constitution, than the franchise. No fewer than four amendments have been adopted to protect or expand the right to vote. The Fifteenth, Nineteenth, and Twenty-Sixth Amendments, for example, prohibit denial of the right to vote on account of race, sex, and age, respectively. *See also* U.S. Const., Amend. XXIV (prohibition on poll tax); *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966) (same).

2. Even more important for present purposes, Article I, Section 2, clause 1 of the Constitution provides that those eligible to vote for members of the United States House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." (Virtually identical language is found in the Seventeenth Amendment's direction for the popular election of U.S. Senators.) Although this language shows that the States have some latitude in prescribing voter qualifications, it also demonstrates that the Framers contemplated that at least one branch of each State's legislature would have to be popularly elected. Indeed, in the debates on the Constitution, even those who preferred selection of federal Representatives by the State legislatures rather than by popular election justified their preference on the ground that the "right of participating in the

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jurisdiction may seek redress. *See Ball v. James,* ____ U.S. ____, 68 L.Ed.2d 150, 163 n.20 (majority opinion), 164 (Powell, J., concurring)(1981); *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60, 76-77 (Stevens, J., concurring) (1978).

National Govt. would be sufficiently secured to the people *by their election of the State Legislatures.*" [9]

3. Finally, Section 4 of Article IV of the Constitution requires that the United States "guarantee to every State in this Union a Republican Form of Government . . . ." Although the Court sometimes has shied away from applying this clause for lack of comprehensive criteria to do so, the Court has concluded that at least some "fundamental principles" emerge from its language. *Baker v. Carr,* 369 U.S. 186, 222-23 n.48 (1962). The "distinguishing feature" of the republican form of government, the Court has stated, "is the right of the people to . . . pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves . . . ." *Duncan v. McCall,* 139 U.S. 449, 461 (1891). There is no doubt that the right to a popularly elected legislature is at the core of this guarantee. *See Minor v. Happersett, supra,* 21 Wall, at 176. *See also The Federalist, supra,* No. 9, at 72 ("republican government" includes "the representation of the people in the legislature by deputies of their own election"); *id.,* No. 10, at 82, and No. 52, at 325-26.

Thus, the Republican Form of Government Clause—which Congress has specifically made applicable to Puerto Rico, *see* p. 12 *supra*—confirms what the other constitutional provisions all prove: "[N]ecessarily the members of the Legislature . . . are elected by the voters of the State." *Minor v. Happersett, supra,* 21 Wall. at 171. *See also Harper v. Virginia State Board of Elections,*

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[9] Madison, *Notes on the Constitutional Convention* (Speech of Mr. Sherman, June 6, 1787), in I M. Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 133 (1927) (emphasis added). *Cf. The Federalist* No. 39, at 241 (New American Library ed., 1961) (the Senate, chosen by the State legislatures, "derives its appointment indirectly from the people"). *See also id.,* No. 52, at 326.

supra, 383 U.S. at 665. The text of the Constitution, therefore, leaves little room to doubt that, as *Reynolds* indicates, qualified voters have a federal constitutional right to elect the members of State legislatures.

C. History Confirms That State Legislators Necessarily Occupy Positions That Must Be Elective.

A wealth of historical evidence reinforces what the text of the Constitution assumes: the Founding Fathers contemplated a union of States in which legislative power would be exercised by officers who owe the legitimacy of their mandate to popular elections. Both the Declaration of Independence and the Constitution rest on the fundamental principle of popular sovereignty, that governments derive "their just powers from the consent of the governed," as the Declaration puts it.

1. By the time of the Declaration of Independence in 1776, the Founders could look back upon a tradition of several centuries during which the right to vote for members of the British House of Commons was assured. See I W. Blackstone, COMMENTARIES *170-71. Indeed, there was an established tradition in English history of protecting the right of free elections to the House of Commons,[10] forbidding official interference in elections,[11] and governing the resolution of election disputes.[12] The authors of our Constitution were intimately familiar with this tradition and strongly disapproved of any episodes that could be considered corruptions of the right to election of the Commons. *See Powell v. McCormack,* 395 U.S. 486, 527-31 (1969) (repeated exclusion of John Wilkes from the Parliament despite popular election); *Wesberry v. Sanders, supra,* 376 U.S. at 14-16 ("rotten

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[10] *See, e.g.,* The First Statute of Westminister, 3 Edw. I c.5. (1275).

[11] 2 W. & M. c.7 (1689); 7 & 8 Will. III c.25 (1696); 10 & 11 Will. III c.7 (1699); 8 Geo. II c.30 (1735).

[12] 23 Hen. VI c.15 (1444); 7 & 8 Will. III c.7 (1696); 10 Geo. III c.16 (1769); 11 Geo. III c.42 (1770).

boroughs"). *See also* B. Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 110-12 (1967).

If anything, the American theory of republican government in the late 18th Century was even more closely wedded to open elections than the English theory, since the English adhered to a notion of "virtual" representation, which the colonists vehemently rejected in favor of the doctrine of actual representation by the people's elected delegates. B. Bailyn, *supra,* at 161-175; G. Woods, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 183-188 (1969). Indeed, among the principal grievances referred to by Jefferson in the Declaration of Independence were the dissolution of the Colonies' own "Representative Houses" and the subjection of the Colonies to acts of Parliament, while denying citizens of the Colonies the right enjoyed by other Englishmen to vote for their representatives. The revolutionary dictum, "Taxation without representation is tyranny," was more than just an abstract political bromide. A sense of history, therefore, forecloses any possibility that the men who made, fought, and won the Revolution were prepared to tolerate any crimping of this most basic civil right.

2. Subsequent history shows just how vigilant they and their successors were in guarding against the notion so blithely accepted by the courts below. As the Court noted in *Minor v. Happersett, supra,* 21 Wall. at 172-73, 176, the constitutions of each of the original States that joined the Union provided for at least one popularly elected branch of the legislature. *See* Appendix IV to this brief. Thus, as Madison emphasized, the "principle of representation, in one branch of the legislature at least, was established in all of" the States. *The Federalist, supra,* No. 52, at 329. No State, of course, has ever entered the Union with a different form of government or adopted one thereafter. Nor could one do so, in light of the explicit command of the Republican Form of Government Clause.

D. The Constitution Establishes A Right To Vote To Fill Legislative Vacancies.

The court below, of course, went only so far as to deny the existence of a right to vote *to fill vacancies* in the legislature (J.S. App. 13b). As suggested by the importance attached by the Framers to the right to vote for legislators, however, our constitutional history warrants no such distinction.

1. In Britain at the time of the Revolution, vacancies in the House of Commons were filled by special elections.[13] Acting under the Articles of Confederation, Congress imposed a similar requirement for by-elections in Section 10 of the Northwest Ordinance of 1787.

The United States Constitution also makes clear the understanding of its Framers that legislative vacancies must be filled by popular election, even in mid-term. Article I, Section 2, clause 4, for example, provides that an open by-election must be held to fill a vacated House seat, even when only a few months remain in the term. The reason is simple: "[T]he people's right to chosen representation is not limited to exercise at a biennial election, but is *a continuing right* which is not to be defeated by death of a Representative once chosen, or other cause of vacancy." *Jackson v. Ogilvie,* 426 F.2d 1333, 1336 (7th Cir.), *cert. denied,* 400 U.S. 833 (1970) (emphasis added).

The Seventeenth Amendment similarly dictates that, when "vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies . . . ." In recognition of the fact that the Seventeenth Amendment marked a sharp change in the historic constitutional arrangement under which, for more than a century,

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[13] I W. Blackstone, *supra,* at 177. *See also* 15 Geo. III c.36 (1775); 10 Geo. III c.41 (1769) (filling of vacancies by election during recess of Parliament).

Senators were appointed by State legislatures (*see* Art. I, § 3, cl. 1), the amendment goes on to permit the legislature to authorize the State executive to make interim appointments. These appointments, however, may only be "temporary . . . until the people fill the vacancies by election as the legislature may direct."[14]

2. The contemporary political systems of the States mirrored the federal guarantee of the right to vote to fill mid-term vacancies. Even though all of the original 13 States established only one-year terms of office in their more numerous house[15]—in contrast to the seven-year maximum duration of a single British Parliament[16]—seven of the original States expressly incorporated the requirement for special elections in their constitutions in effect in 1787. *See* App. I to this brief.[17] That they did so, despite the enormous travel and communications difficulties inhibiting the conduct of elections in the 18th Century, is eloquent testimony to how dearly the Founding Fathers held the principle of electoral accountability.

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[14] The central purpose of the Amendment was, according to its original author, Representative Tucker, to promote "the principle of election by the people." H.R. Rep. No. 368, 52nd Cong., 1st Sess. 5 (1892). Although *Valenti v. Rockefeller*, 292 F. Supp. 851 (S.D.N.Y. 1968), *aff'd per curiam*, 393 U.S. 405 (1969), sustained the appointment of an interim United States Senator for 29 months, this was less than half the full term of office. *Valenti* specifically held that the Seventeenth Amendment limits "the discretion of the states concerning the timing of vacancy elections by specifying that a Governor may make only a 'temporary' appointment until an election is held." *Id.* at 856.

[15] The relevant provisions of the state constitutions are the same as those cited in Appendix IV to this brief, with the following exceptions: Georgia — Art. II; New Jersey — § 3; New York — § 4; Pennsylvania — § 9; Rhode Island — *see* 8 SOURCES AND DOCUMENTS OF THE UNITED STATES CONSTITUTIONS 365 (W. Swindler ed. 1973); South Carolina — Art. XII.

[16] J. Plumb, THE GROWTH OF POLITICAL STABILITY IN ENGLAND 1675-1725, at 174-75 (Penguin ed. 1975).

[17] These seven States were Delaware, Georgia, Maryland, New Hampshire, North Carolina, South Carolina, and Virginia.

In their initial constitutions, the other six original States did not expressly address the question of filling legislative vacancies. By 1844, however, three of them had amended their constitutions to include an express provision for by-elections.[18] Moreover, in Massachusetts, the constitution was interpreted to require elections if vacancies were filled. *Opinion of the Justices,* 20 Mass. 546, 548, 549 (1826). When the New York Constitution in 1846 authorized its legislature to provide for filling vacant seats, that constitution required that, if some method other than popular election were chosen, the successor's term of office could run only until the next general election; general elections for members of the assembly remained annual.[19] Indeed, by the time the Fourteenth Amendment was adopted in 1868, only Connecticut, among the original States, seems to have lacked a constitutional provision or decision calling for by-elections to fill legislative vacancies.

Another 24 States had joined the Union by 1868. When entering the Union, not one of these States provided for filling vacant seats by appointment. On the contrary, 21 specifically insisted in their constitutions on special by-elections. *See* App. I. Two others, Florida and West Virginia, adhered to the same practice by statute. *Id.* Of all the States admitted between 1790 and 1868, only Vermont did not expressly require special elections to fill legislative vacancies; it simply did not address the question either in its constitution or by statute. In Vermont, however, the legislative term for the more numerous house was just one year, making it difficult to fill any vacancies at all. Vt. Const. of 1793, Ch. 2, § 8.[20]

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[18] N.J. Const. of 1844, Art. IV, § 4, cl. 1; Penn. Const. of 1790, Art. I, § 19; R.I. Const. of 1842, Art. VIII, § 9.

[19] New York Const. of 1846, Art. X, § 5, and Art. III, § 2.

[20] Even when States permitted appointments to county commissions or other similar elective positions, they overwhelmingly allowed "an appointee to remain in office 'only until the people who elected

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3. The "contemporaneous and subsequent practical construction" of the Federal Constitution shown by this historical evidence "is entitled to the greatest weight." *McPherson v. Blacker,* 146 U.S. 1, 27 (1892). The thrust of this historical experience is clear. The United States Constitution necessarily requires each State to establish a government in which, at least in the absence of compelling excuse, the people of a district are entitled to vote for their representative in the general legislature, whether the vacancy to be filled arises upon expiration of a term or during it.

4. As we have seen, the same protection of fundamental civil liberties applies in Puerto Rico. Accordingly, the court below erred when it sustained the validity of a Puerto Rico statute that automatically dispenses with a by-election whenever the former legislator's political party tenders a single candidate to fill his vacancy.

III. APPOINTMENTS TO FILL LEGISLATIVE VACANCIES VIOLATE THE CONSTITUTIONAL RIGHT OF THE QUALIFIED VOTERS OF EACH LEGISLATIVE DISTRICT TO PARTICIPATE EQUALLY IN THE POLITICAL PROCESS.

1. Even if the States were free to entrust the general lawmaking function to some institution other than an elected legislature, the fact is that Puerto Rico (like every State of the Union) *has* vested all legislative power in an elected legislature. Once an office is made elective, "lines cannot be drawn [among electors] that are inconsistent with the Equal Protection Clause . . . ." *Kramer v. Union Free School District No. 15, supra,* 395 U.S. at 629. As the

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his predecessor have the first opportunity to fill the office with a person of their own choice . . . .' " *Valenti v. Rockefeller, supra,* 292 F. Supp. at 883 (Frankel, J., dissenting). Indeed, "numerous cases" have held "that vacancies in elective offices should be filled at an election as soon as practicable after the vacancy occurs and appointments to fill vacancies should be effective only until the people may elect." 132 A.L.R. 574, 576 (1941).

Court firmly established in *Reynolds*, "all voters, as citizens of a State, stand in the same relation" and must have an equal voice in the legislative process, "regardless of where they live." 377 U.S. at 565. *See also, e.g., Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

2. In this case, however, while the residents of every other legislative district in Puerto Rico have chosen their incumbent representative in free and open elections, the residents of District 31 have been prevented from doing so by Article 5.006 of the Electoral Law. Appellants and the other citizens of District 31 are to be "represented" for almost four years by a legislator who does not owe his office to any district-wide popular constituency. Their "representative" was chosen in a skewed election involving only 5,000 members of a single political party, even though more than 40,000 voters in the district had turned out to express their choice a few months earlier. The residents of District 31 who were not members of the PDP were excluded altogether from this election, and even the residents who were affiliated with the PDP were denied the opportunity to cross party lines and vote for an independent candidate or a candidate from a different party. This system has denied appellants and others an equal voice in the legislative process.

3. It is immaterial to appellants' equal protection claim that the voters of District 31 participated on an equal basis with all other citizens of Puerto Rico in the 1980 general elections. If that earlier opportunity were sufficient, Puerto Rico could simply have declined to fill Representative Muniz's seat for the remainder of his four-year term. That course, however, would have been impermissible, for it would have left the residents of District 31, unlike every other voter in Puerto Rico, completely bereft of any opportunity for "full and effective participation in the political processes of [their] State's legislative bodies." *Reynolds v. Sims, supra*, 377

U.S. at 565. The relevant inquiry, therefore, is not what opportunities the voters of District 31 had to vote for their former Representative, but whether they have had the same voice in choosing their *incumbent* Representative as their fellow citizens in other districts.

4. The appointment of a nominal "representative" to replace Representative Muniz does not eliminate the constitutional defects in the Puerto Rico Electoral Law. The Constitution would scarcely condone a legislative scheme under which some districts elect their representatives, while others have their "representatives" appointed on their behalf. But this is no different from the result that the Puerto Rico statute actually achieves.

As we have seen, our entire system of government is founded on the principle that it makes all the difference in the world whether legislators are elected or appointed. Popular sovereignty and electoral government are inseparable. Indeed, this Court recognized in *Reynolds* that most citizens can have a voice in government "*only* as qualified voters through the election of legislators to represent them." 377 U.S. at 565 (emphasis added). An elected legislator owes his office to the people. He acts and speaks on their behalf, *cf. Bond v. Floyd*, 385 U.S. 116 (1966), and his legislative actions have legitimacy precisely because of his election. An appointed legislator under the Puerto Rico system, on the other hand, owes his office to the organization that appointed him. His legislative actions lack the legitimacy enjoyed by colleagues selected in the crucible of an open election. These two types of "representatives" certainly are not fungible for purposes of the Equal Protection Clause.

IV. EXCLUSIVE CONTROL OF APPOINTMENTS TO FILL LEGISLATIVE VACANCIES MAY NOT BE VESTED IN A POLITICAL PARTY.

In addition to obliterating the fundamental electoral rights of the citizens of District 31, the Puerto Rico party

appointment system excludes some qualified voters within the District from having any voice in the selection of their legislative representative solely because of their political affiliation. This discrimination infringes basic First Amendment freedoms and Equal Protection principles.

A. The "Party Ownership" Feature Of The Puerto Rico Electoral Law Abridges The First Amendment Rights Of Voters Who Are Not Members Of The Favored Party.

This Court has held in numerous cases that government cannot, consistently with the First Amendment, rely on political association as a basis for imposing burdens on individuals or denying them public benefits. *See, e.g., Perry v. Sindermann,* 408 U.S. 593 (1972); *United States v. Robel,* 389 U.S. 258 (1967); *Keyishian v. Board of Regents,* 385 U.S. 589 (1967). In explaining why new political parties cannot be barred from the ballot, the Court has affirmed both "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" and "the right of individuals to associate for the advancement of political beliefs"—two rights that rank "among our most precious freedoms." *Williams v. Rhodes,* 393 U.S. 23, 30 (1968). The First Amendment, therefore, bars any system for filling legislative vacancies under which the right of citizens to participate in the selection process turns upon their political allegiance.[21]

There can be no question that the choice of a legislative representative in the circumstances presented here constituted "state action" subject to constitutional constraints. The PDP's selection of Mr. Corujo was not

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[21] *See, e.g., Dunn v. Blumstein, supra,* 405 U.S. at 355 (" 'Differences of opinion' may not be the basis for excluding any group or person from the franchise."); *Carrington v. Rash,* 380 U.S. 89, 94 (1965) (" 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.").

merely the internal activity of a political party. This Court long ago held in the White Primary Cases that even "party primaries" constitute state action when they are the functional equivalent of the general election or when the winner is given preferential ballot access. *See, e.g., Terry v. Adams,* 345 U.S. 461 (1953); *Smith v. Allwright,* 321 U.S 649 (1944). Here, the Electoral Law, as construed by the court below, formally deemed a single party's choice "automatically elected" to public office (J.S. App. 6b).

The Court recognized in *United Public Workers v. Mitchell,* 330 U.S. 75, 100 (1947), that "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office . . . .' " It is equally obvious that Puerto Rico could not adopt a law providing that only Democrats, or only Protestants, or only whites may participate in the selection of a legislator. *See also, e.g., McDaniel v. Paty,* 435 U.S. 618 (1978). Yet the court below expressly upheld a statute that excludes everyone other than members of a single political party from participating in the selection of a new Representative.

Even in *Williams v. Rhodes, supra,* there was a mechanism, albeit a limited one, whereby every party and its membership could gain access to the ballot. In the present case, however, all non-PDP members—including independent voters and opposition party members who voted for Representative Muniz—were completely frozen out of the process of choosing Representative Muniz's successor. Exclusion from the governmental process because of political philosophy and party membership can hardly be squared with the freedom of political association guaranteed by the First Amendment.[22]

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[22] The record does not show whether, in holding its March 1981 election, the PDP allowed only voters registered under its emblem at the time of the 1980 general election to participate, or instead opened

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B. The "Party Ownership" Theory Is Also Offensive To Basic Principles Of Equal Protection.

1. This Court's voting rights decisions under the Equal Protection Clause prohibit discrimination among classes of citizens in matters as fundamental as the "voice they may have in the governmental affairs which substantially affect their lives." *Kramer v. Union Free School District No. 15, supra,* 395 U.S. at 627. Withholding this voice from one category of citizens—non-PDP members—is inconsistent with the "basic assumption" of our constitutional system that "the institutions of state government are structured so as to represent fairly all the people." *Id.* at 628. As Justice Powell has written:

> "Whatever his disagreement may be with the judgments of public officials, *the citizen should never be given just cause to think that he was denied an equal right to [select] them.*" *Rosario v. Rockefeller,* 410 U.S. 752, 764 (dissenting opinion) (emphasis added).

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up its registration lists to new members. Since appellants were actually denied any say in the selection of Representative Muniz's successor solely because they were not affiliated with the PDP, it is irrelevant whether they were afforded an opportunity to join the party and thereby participate in the election. *See, e.g., Branti v. Finkel,* 445 U.S. 507, 516-17 (1980).

Even if non-PDP members were given such an opportunity, however, that only aggravated the First Amendment defects in the statute, by inducing them to compromise their individual beliefs by joining the PDP in order to have a voice in the selection of "their" Representative. *See Elrod v. Burns,* 427 U.S. 347, 355-57 (1976) (plurality opinion); *Board of Education v. Barnett,* 319 U.S. 624, 642 (1943) (government may not "prescribe what shall be orthodox in politics").

Notwithstanding this sound admonition, in this case Representative Muniz's successor *was* chosen by an election in which only PDP members were eligible to vote and from which non-PDP candidates were excluded. Since this was one of the types of procedure that the PDP was authorized by the Electoral Law to utilize to select the new Representative, it necessarily constituted state action for equal protection purposes. And despite the fact the Court has already held that a State must show a compelling justification for any voter qualification beyond age, residence, and citizenship, *Hill v. Stone,* 421 U.S. 289, 297 (1975), the sole ground for exclusion from this election was party affiliation. Since, as we show in Point V below, there is no compelling justification for Puerto Rico's "party ownership" classification, the Electoral Law, as construed and applied in this case, also denied appellants the equal protection of the laws.

2. The court below ruled that the PDP was lawfully entitled to appoint the new Representative from District 31, without any form of election. Even without a formal electoral role, this ruling awarded members of one party a substantially more favorable opportunity than their non-party counterparts to influence the appointment of the District's legislative representative. Even when the party leadership simply names a legislative successor without any direct involvement of the rank and file, the leadership is responsible to the party membership in making its choice. Moreover, the membership retains the power to insist, if it wants, on greater involvement in the selection process through a party election. Appropriately, no court, to our knowledge, has approved an appointment to any public office by a political party.[23]

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[23] In *Kaelin v. Warden,* 334 F. Supp. 602 (E.D. Pa. 1971), a sharply divided three-judge court upheld a Pennsylvania statute governing vacancies in the office of county commissioner. Although

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A statutory classification that gives political parties rather than the voters or at least elected officials the direct control over selection of legislators is impermissibly discriminatory. The basic interests at stake are those of the people to be represented, but a single party is hardly likely to act as a responsive surrogate for the popular will.[24] When political parties simply nominate candidates to run for office, they necessarily gauge the candidate's ability to attract support among the electorate. But even this limited brake on partisan excess is absent when the party is elevated into the position of appointing authority. The "party ownership" system thus seems destined only to repeat some of the uglier chapters in our political history by giving the force of law to what has heretofore been regarded as a usurpation of popular sovereignty. *See generally, e.g.*, A. Connable & E. Silberfarb, TIGERS OF TAMMANY (1967); T. Lowi, AT THE PLEASURE OF THE MAYOR (1964).

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the new official had to be of the same party as his predecessor, the majority there stressed that it was addressing a special electoral system, called "limited voting," designed to promote minority representation on the county commission. Moreover, the power of appointment in *Kaelin*, while channeled along party lines, was actually vested in judges who under Pennsylvania law, *see* Penn. Constitution, Art. 5, § 13, were directly accountable to the entire electorate.

[24] The common sense perception that appointments by elected officials are different from party appointments and more likely to be responsive to the public interest is sound. The available evidence indicates that governors, for example, often view party affiliation as an inappropriate basis for appointment to State office. *See* Beyle & Dalton, *Appointment Power: Does It Belong to the Governor?*, 54 State Government 2 (1981); Muchmore & Beyle, *The Governor As Party Leader*, 53 State Government 121 (1980).

See also Patterson v. Burns, 327 F. Supp. 745, 752 (D. Hawaii 1971), where the district court in dictum rejected an equal protection attack on a gubernatorial appointment to a vacant legislative seat, stating that it had to be assumed that the governor "would act in good faith and seek to protect the interests of the . . . District's voters . . . ."

V. THE BURDENS ON APPELLANTS' CONSTITUTIONAL RIGHTS CANNOT SURVIVE THE CONSTITUTIONALLY REQUIRED STANDARD OF STRICT SCRUTINY.

No "compelling" governmental interests justify the dubious principle, accepted by the court below (J.S. App. 14b), that political parties may be given the right to appoint State legislators to four-year terms.

A. The Puerto Rico Election Laws Are Subject To Strict Scrutiny.

1. This Court has made clear in case after case that statutes creating "suspect classifications" or impinging upon constitutionally protected rights must undergo "searching judicial scrutiny." *San Antonio School District v. Rodriguez, supra,* 411 U.S. at 40. A law that "has a real and appreciable impact on the exercise of the franchise," therefore, must be able to survive "the strict standard of review." *Bullock v. Carter,* 405 U.S. 134, 142, 144 (1972). *See also, e.g., Reynolds v. Sims, supra,* 377 U.S. at 562. The same standard of review, of course, governs a statute that substantially restrains or significantly interferes with the right protected by the First and Fourteenth Amendments "to associate with the political party of [one's] choice." *Kusper v. Pontikes,* 414 U.S. 51, 57, 58 (1973). *See also, e.g., Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1970).

A law that impinges on a fundamental right "is presumptively unconstitutional." *City of Mobile v. Bolden,* 446 U.S. 55, 76 (1980) (plurality opinion). To be upheld, such a statute must surmount two high hurdles. First, it must serve a "substantial and compelling" governmental interest. *Dunn v. Blumstein, supra,* 405 U.S. at 335. In addition, even if the law promotes "a very substantial state interest," the State may not pursue that

interest by "means that unnecessarily burden or restrict [the] constitutionally protected activity." *Id.* at 343. *See also, e.g., NAACP v. Button*, 371 U.S. 415, 438 (1963).

2. These principles are applicable here. Under the decision below, appellants have been totally excluded from the process of selecting their own legislative representative, despite the constitutional right of qualified voters to choose the members of State legislatures. Moreover, appellants have been fenced out from participation in this process solely on the basis of their non-affiliation with the PDP. Thus, whether one examines the benefit withheld (an effective franchise) or the basis for the withholding (lack of membership in the "right" political party), it is evident that the Puerto Rico election laws must be subjected to strict scrutiny.

B. Experience Undermines Any Claim That Articles 5.006 and 5.007 Are Necessary To Serve Some Compelling Governmental Interest.

1. The United States Constitution and the laws of the great majority of States do not permit the appointment of legislative representatives in the circumstances of this case. The Constitution unequivocally requires that vacancies in both Houses of Congress be filled by means of open by-elections. *See* U.S. Const., Art. I, § 2, cl. 4; U.S. Const., Amend. XVII. The great majority of States follow the same practice. *See* J.S. App. G. Yet there is no evidence of any disruption or political turmoil resulting from this longstanding and widespread recognition of the need to protect the voting rights of all citizens.

The Superior Court of Puerto Rico took comfort from the fact that several States have provided for party-controlled appointment under the concept that the seat "belongs to the party," *see* J.S. App. 33a, a finding noted with approval by the Puerto Rico Supreme Court, *see* J.S. App. 14b n.5. What is of paramount significance, how-

ever, is that most States have *not* found any reason to adopt this restrictive procedure, but continue to fill vacant seats in their legislatures by open elections. Moreover, virtually all of these States insist on the election of legislative successors, even though the term of office for their House members is no more than two years. Only Maryland and Nebraska join Puerto Rico in permitting an appointed representative to fill the unexpired portion of a four-year term in their more populous legislative chamber. *See* J.S. App. G.

2. Even Puerto Rico's own Electoral Law implicitly concedes the feasibility of contested elections to fill legislative vacancies. As the court below construed Article 5.006, there is to be a contested election if the former legislator's party fails to present a nominee or decides to present more than one candidate to fill the vacant seat (J.S. App. 6b, 15b). Moreover, the third paragraph of Article 5.006, taken together with Article 5.007, provides that, if the former legislator was an independent, any candidate who fulfills the requirements of the office may run in an election in which all qualified voters may vote. *See* J.S. App. 1f-2f. Thus, the pattern established by the federal government and most States—and followed even by Puerto Rico in some circumstances—provides persuasive evidence that no compelling governmental interest justifies Puerto Rico's refusal to hold an open by-election in this case.[25]

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[25] *See, e.g., City of Phoenix v. Kolodziejski*, 399 U.S. 204, 212-13 (1970) (limit on right to vote on issuance of general obligation bonds could not be sustained as necessary when only 14 States imposed such a limitation); *Williams v. Rhodes, supra*, 393 U.S. at 33 n.9; *Harman v. Forssenius*, 380 U.S. 528, 543 (1965). *See also, e.g., Carrington v. Rash, supra*, 380 U.S. at 95 (State's ability to identify *bona fide* residents among some transient groups vitiated statutory presumption that all military personnel were nonresidents for voting purposes); *Hill v. Stone, supra*, 421 U.S. at 299; *Dunn v. Blumstein, supra*, 405 U.S. at 358-59; *Evans v. Cornman, supra*, 398 U.S. at 421.

C. The Putative Governmental Interests Suggested By The Court Below Do Not Sustain The Puerto Rico Election Laws.

The Supreme Court of Puerto Rico attempted to justify Puerto Rico's party appointment scheme in light of the following allegedly "compelling" goals:

> "[T]hat there be *no changes in the legislative balance* until the next general election is held, the *stability of governmental structures,* the *protection of the electoral mandate* of the previous general election, and the *reduction of inter-partisan political campaigns* to once every four years." J.S. App. 14b (emphasis added).

Even viewed most credulously, these interests dissolve upon analysis. Far from constituting substantial and compelling governmental objectives, these interests actually reflect goals wholly inconsistent with the values enshrined in our Constitution.

1. *"Reduction of Inter-Partisan Political Campaigns."* In asserting a public interest in reducing the number of political campaigns, the court below was alluding to governmental interests (a) in avoiding the administrative burdens and costs of campaigns and (b) in securing what the PDP euphemistically calls "political repose." Motion to Dismiss at 24. Neither of these objectives by itself can sustain Articles 5.006 and 5.007, since neither even purports to justify vesting a political party with power to appoint a State legislator. At most these objectives might support a politically nondiscriminatory appointment system, but that is not the system created by the Electoral Law.

Although it may be easier and less expensive for States to dispense with by-elections when vacancies arise, this preference scarcely warrants a flat limitation on political campaigns to once every four years. Because the

Constitution "recognizes higher values than speed and efficiency," *Stanley v. Illinois,* 405 U.S. 645, 656 (1972), fundamental constitutional rights cannot be sacrificed on the altar of administrative ease or financial saving. *See, e.g., Carey v. Population Services International,* 431 U.S. 678, 691 (1977); *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 264 (1974). Nowhere is this more true than with respect to the right that is "preservative of all rights"—the right to vote. *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). As this Court held in *Bullock v. Carter, supra,* 405 U.S. at 148-49:

> "Viewing the myriad governmental functions supported from general revenues, it is difficult to single out any of a higher order than the conduct of elections at all levels to bring forth those persons desired by their fellow citizens to govern. *Without making light of the State's interest in husbanding its revenues, we fail to see such an element of [financial] necessity . . . as to justify the resulting incursion on the prerogatives of voters."* (Emphasis added). *See also, e.g., Carrington v. Rash, supra,* 380 U.S. at 96.

Moreover, the government has no legitimate authority to protect political parties from the costs that they may choose to incur in election campaigns:

> *"The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise.* In the free society ordained by our Constitution it is not the government, but the people — individually as citizens and candidates and collectively as associations and political committees — who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley v. Valeo,* 424 U.S. 1, 57 (1976) (emphasis added).

Finally, any governmental goal of keeping the strains of political debate confined to quadrennial elections impermissibly frustrates fundamental freedoms of speech and association—freedoms that have their "fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), surely prohibits Puerto Rico from preempting a political campaign to fill a legislative vacancy in order to achieve quietude. What the PDP terms "political repose" is, in short, nothing less than repression of the "robust debate" on which our democratic system rests for its survival.

2. *"Stability of Governmental Structures."* In *Williams v. Rhodes, supra*, when Ohio argued that its attempt to promote "political stability" constituted a compelling state interest justifying election laws that hindered new political parties from obtaining a place on the ballot, this Court rejected that rationale. While recognizing that "a two-party system . . . [might] encourage compromise and political stability," the Court stressed that the challenged system of ballot access impermissibly tended to give the entrenched political parties "a complete monopoly." 393 U.S. at 31-32.

The Ohio laws invalidated in *Williams* at least allowed the two parties to compete in the political arena, but Articles 5.006 and 5.007 award a single party a monopoly in the strictest sense. Not even the opportunity to make a limited choice, which was preserved in the Ohio system, is allowed here. The stability of a State's political system, therefore, can hardly sustain the Puerto Rico Electoral Law.

The PDP has relied on *Storer v. Brown*, 415 U.S. 724 (1974), where this Court acknowledged that a State has a legitimate interest in regulating access to the ballot. Nothing in that decision, however, even remotely suggests that, in the interest of stability, a State may "freeze the political *status quo*," *Jenness v. Fortson*, 403 U.S. 431, 438 (1971), by reducing the number of candidates to one or dispensing with an election entirely. Furthermore, the Court in *Storer* upheld the State statute not simply because it furthered governmental stability, but because the statute helped to assure that "some sort of order, rather than chaos," would accompany the electoral process. 415 U.S. at 730. The Court, in other words, invoked the concept of "political stability" in *Storer* in connection with the protection and enhancement of the electoral process, not its elimination.

The Puerto Rico party appointment system, by contrast, is designed to avoid the electoral process altogether. It aims to achieve political stability by imposing order through single party control in defiance of the electoral process. It is difficult to conceive of a methodology that is more hostile to the principles of representative democracy.

3. *"No Changes in the Legislative Balance" and "Protection of the Electoral Mandate."* The Puerto Rico Supreme Court tried to justify "party ownership" of a legislator's seat by referring to the goals of preserving "the legislative balance" and protecting "the electoral mandate." These objectives rest on the same dubious assumption that a political party has a legitimate right to maintain a constant level of legislative power despite its inability to secure popular support for its candidate in a by-election. Quite apart from the fact that the federal government and most States do not recognize such a right, the decisions of this Court decisively refute any such notion.

a. The PDP and the court below failed to recognize that "the interest of partisan organizations" must not be confused "with governmental interests." *Elrod v. Burns, supra,* 427 U.S. at 362 (plurality opinion). Thus, the Constitution does not permit the preservation of party power to be erected as a bar to the "[c]ompetition in ideas and governmental policies" that is at "the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes, supra,* 393 U.S. at 32.

This principle applies to the filling of legislative vacancies in mid term no less than to general elections. Those in power, of course, always have a stake in maintaining the political *status quo.* Yet the "capacity to displace incumbents in favor of the representatives of a recently coalesced majority is . . . an essential attribute of the election system in a democratic republic." L. Tribe, AMERICAN CONSTITUTIONAL LAW § 13-18, at 774 (1978). If the voters are unwilling to elect a candidate of the same party as that of his predecessor, there is no legitimate, much less compelling, governmental interest in frustrating the majority's current will. Legislative seats simply are not hereditary party fiefdoms.

Even though election of a Representative with a different affiliation may lead to a different result on some legislative issues, that is simply the healthy functioning of republican government, not something to be feared. What the PDP and the court below have ignored in justifying attempts to freeze for four years a party's "legislative balance" and "electoral mandate" are the words of Justice Brandeis many years ago:

> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." *Whitney v. California,* 274 U.S. 357, 377 (1927) (dissenting opinion).

b. Political parties, to be sure, play an important and constitutionally protected role in aggregating and channeling individual political preferences. *See, e.g., Democratic Party of the United States v. LaFollette,* 449 U.S. 897 (1981). But a party's right to autonomy in its internal affairs scarcely means that the party may be vested with unfettered power to decide who will occupy public office. Political parties perform the important function of fielding candidates for office only in service of the right of individual voters to participate in the electoral process — a right that is "individual and personal in nature." *Reynolds v. Sims, supra,* 377 U.S. at 561. As a result, neither the government nor the parties themselves can have a legitimate interest in procedures that undermine the exercise of the individual's preeminent right by preempting or crimping legislative elections.

Political parties in Puerto Rico are no different in this respect from political parties elsewhere in the United States. Indeed, the Supreme Court of Puerto Rico itself has recently stressed that, "notwithstanding their great importance, . . . political parties are a means and not an end . . . ." *Puerto Rico Socialist Party v. Commonwealth Election Commission,* ___ P.R. ___, 80 J.T.S. 92 (December 2, 1980). The court continued:

> "The main subject of the modern controlled electoral-constitutional system is the individual voter. *The party is not the ultimate element but a vehicle of individual expression* which, along with other elements, implements the collective expression of the citizenry. Hence, all statutes regulating the elective franchise have been directed to acknowledge 'the prevalence of the citizens' voting rights over the rights and prerogatives of all the political parties and groups.' Art. 2.001(11) (16 L.P.R.A. 3051(11)). *In the final analysis, this individual right is the crux of the system . . . .*" *Id.* (emphasis altered).

To put the point simply, both as a matter of fact and as a matter of law, legislators are elected by and represent the individual citizens of their districts, not political parties. They are not properly viewed as the pawns of political bosses or the mechanical surrogates of party platforms. Consequently, there is no "electoral mandate" belonging to a party that somehow exists independently of the individual representative elected by the people. Nor does the party acquire a vested right to maintain its legislative strength as a result of the election of any candidate that it nominates.

c. Experience illustrates these practical truisms. For instance, there are numerous examples of legislators who have changed party allegiance during their terms of office. *See, e.g.*, App. II to this brief. Indeed, this has happened in Puerto Rico itself. *See* App. III to this brief. No one, to our knowledge, has ever even imagined that these changes in affiliation violated the right of any political party to "ownership" of the seat. Yet the arguments designed to support "party ownership" of a vacant seat would apply just as well to a legislator's change of party affiliation. This proves the essential fallacy of the arguments. Our constitutional system has always recognized that the seat belongs to the successful candidate rather than to the party that supported his candidacy, because the people have elected him, not his party, to office.

In this very case, Representative Muniz was not elected by the PDP as a separate entity, or even by its membership alone. His narrow victory would not have been achieved if only party-line ballots had been counted. Nor is there any reason to presume that Representative Muniz, once elected, would have functioned as an automaton who would invariably have done his party's bidding. In no realistic sense, therefore, did the voters of District 31, by electing Representative Muniz, delegate to the PDP their constitutional right to select their new

Representative. Under the Constitution, the people of District 31, including appellants, were entitled to make their own choice in an open by-election.

In sum, the PDP has no valid — much less compelling — claim to "ownership" of the seat to which the voters of District 31 elected Representative Muniz.

CONCLUSION

The judgment below should be reversed and the case remanded for appropriate proceedings leading to a prompt, open by-election in which any candidates may run and all qualified voters may participate.

Respectfully submitted.

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Appendix

APPENDIX I

CONSTITUTIONAL PROVISIONS REGULATING THE VACANCIES IN STATE LOWER LEGISLATIVE HOUSES AT THE TIME OF ADMISSION TO THE UNION (COVERING STATES ADMITTED THROUGH 1868)

States	Year of Admission	Applicable Provision	Special Election	No Provision	Other Provision
Alabama	1819	Const. of 1819 Article III, Section 20	X		
Arkansas	1836	Const. of 1836 Article III, Section 9	X		
California	1850	Const. of 1849 Article IV, Section 13	X		
Connecticut	1788	Colonial Charter of 1662		X	
Delaware	1787	Const. of 1776 Article V	X		
Florida	1845	Const. of 1838 Article VI, Section 12			X(a)
Georgia	1788	Const. of 1777 Article VII	X		
Illinois	1818	Const. of 1818 Article II, Section 11	X		
Indiana	1816	Const. of 1816 Article III, Section 12	X		
Iowa	1846	Const. of 1846 Article III, Section 12	X		
Kansas	1861	Const. of 1859 Article II, Section 9	X		
Kentucky	1792	Const. of 1792 Article I, Para. 24	X		
Louisiana	1812	Const. of 1812 Article II, Section 26	X		
Maine	1820	Const. of 1819 Article IV, Part I, Section 6	X		
Maryland	1788	Const. of 1776 "Form of government," VII	X		
Massachusetts	1788	Const. of 1780		X(b)	
Michigan	1837	Const. of 1835 Article IV, Section 20	X		

States	Year of Admission	Applicable Provision	Special Election	No Provision	Other Provision
Minnesota	1858	Const. of 1857 Article IV, Section 17	X		
Mississippi	1817	Const. of 1817 Article III, Section 18	X		
Missouri	1821	Const. of 1820 Article III, Section 9	X		
Nebraska	1867	Const. of 1867 Article III, Section 30	X		
Nevada	1864	Const. of 1864 Article IV, Section 12	X		
New Hampshire	1788	Const. of 1784 Part II, "House of Representatives," Para. 6	X		
New Jersey	1787	Const. of 1776		X(c)	
New York	1788	Const. of 1777		X(d)	
North Carolina	1789	Const. of 1776 "Form of government," Section 10	X		
Ohio	1803	Const. of 1802 Article I, Section 12	X		
Oregon	1859	Const. of 1857 Article V, Section 17	X		
Pennsylvania	1787	Const. of 1776		X(e)	
Rhode Island	1790	Colonial Charter of 1663		X(f)	
South Carolina	1788	Const. of 1778 Section XIX	X		
Tennessee	1796	Const. of 1796 Article I, Section 12	X		
Texas	1845	Const. of 1845 Article III, Section 15	X		
Vermont	1791	Const. of 1786		X	
Virginia	1788	Const. of 1776 Final Paragraph	X		
West Virginia	1863	Const. of 1861 Article III, Section 7			X(g)
Wisconsin	1848	Const. of 1848 Article IV, Section 14	X		

FOOTNOTES

(a) The Florida Constitution allowed the legislature to prescribe by law the method for filling vacancies. In 1845, when the State was admitted to the Union, special elections were adopted as the method for filling vacancies. Laws of 1845, Representative in Congress & C., Chapter 16, Section 5.

(b) *Opinion of the Justices,* 20 Mass. 546 (1826), requires that if a vacancy is filled, it must be by election.

(c) New Jersey's next Constitution, in 1844, provided for filling vacancies by special election, Article IV, Section 4.

(d) The New York Constitution of 1846 allowed the legislature to prescribe a method for filling vacancies, but where an elective office was involved, no appointment could last longer than the start of the political year following the next annual general election, Article X, Section 5; Article III, Section 2.

(e) The Pennsylvania Constitution of 1790 adopted special elections to fill vacancies, Article I, Section 19.

(f) Rhode Island's first post-colonial Constitution, in 1842, provided for filling vacancies by a new election, Article VIII, Section 9.

(g) The West Virginia Constitution allowed the legislature to determine by law the method of filling vacancies. In 1863, at the time of the State's admission to the Union, special elections were adopted, Laws of 1863, Elections by the People, Chapter 100, Section 45.

APPENDIX II

CONGRESSMEN IN THE 20TH CENTURY SERVING UNDER MULTIPLE POLITICAL PARTIES

Senators

Sen. Harry F. Byrd, Va. Democrat, 1965-71; Independent, 1971-

Sen. Fred Thomas Dubois, Idaho (served as Territorial Delegate, House of Representatives, 1887-90; Senate, 1891-97, 1901-07). Republican, 1887-97; Silver Republican, 1901; Democrat, 1901-07.

Sen. Ernest Lundeen, Minn. (served in House of Representatives, 1917-19, 1933-37; Senate, 1937-40). Republican, 1917-19; Farmer Laborite, 1933-40.

Sen. Wayne Lyman Morse, Ore. Republican, 1945-52; Independent, 1952-55; Democrat, 1955-69.

Sen. George William Norris, Neb. Republican, 1913-37; Independent Republican, 1937-43.

Sen. Donald Wayne Riegle, Jr., Mich. (served in House of Representatives, 1967-76; Senate, 1976-). Republican 1967-73; Democrat, 1973- .

Sen. John Franklin Shafroth, Colo. (served in House of Representatives, 1895-1904; as Governor, 1909-13; in Senate, 1913-1919). Republican, 1895-97; Silver Republican/Democrat, 1897-1903; Democrat, 1903-19.

Sen. Henrik Shipstead, Minn. Farmer Laborite, 1923-41; Republican, 1941-47.

Sen. James Strom Thurmond, S.C. (served as Governor, 1947-51; in Senate, 1954-). Democrat, 1947-64; Republican, 1964- .

Source: Computer Files of Congressional Quarterly, except as otherwise noted.

Sen. Charles Arnette Towne, Minn./N.Y. (served in House of Representatives (Minn.) 1895-97; (N.Y.) 1905-07; Senate (Minn.) 1900-01). Republican, 1895-97; Democrat, 1900-07.

Sen. Thomas Edward Watson, Ga. (served in House of Representatives, 1891-93; Senate, 1921-22). Populist, 1891-93; Democrat, 1921-22.

Representatives

Rep. Thomas Ryan Amlie, Wis. Republican Progressive, 1931-33; Progressive, 1935-39.

Rep. Eugene V. Atkinson, Pa. Democrat, 1978-81; Republican, 1981- .*

Rep. Gerald John Boileau, Wis. Republican, 1931-35; Progressive, 1935-39.

Rep. Guy Edgar Campbell, Pa. Democrat, 1917-23; Republican, 1923-33.

Rep. William Leighton Carss, Minn. Independent, 1919-21; Farmer Laborite, 1925-29.

Rep. Walter Marion Chandler, N.Y. Progressive, 1912-19; Republican, 1921-23.

Rep. Robert Henry Clancy, Mich. Democrat, 1923-25; Republican, 1927-33.

Rep. Vincent John Dellay, N.J. Republican, 1957; Democrat, 1958-59.

Rep. Thomas M. Foglietta, Pa. Independent, 1980; Democrat, 1980- .

Rep. Harold Christian Hagen, Minn. Farmer Laborite, 1943-45; Republican 1945-55.

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* Washington Post, October 15, 1981, A4; 39 Congressional Quarterly 2029, October 17, 1981.

Rep. Frank Roberts Havenner, Calif. Progressive, 1937-39; Democrat, 1939-41 and 1945-53.

Rep. Merlin Hull, Wis. Republican, 1929-31; Progressive, 1935-47; Republican, 1947-53.

Rep. William James Hulings, Pa. Progressive, 1913-15; Republican 1919-21.

Rep. John Jarman, Okla. Democrat, 1951-75; Republican, 1975-77.

Rep. William Kent, Calif. Progressive Republican, 1911-13; Independent, 1913-17.

Rep. Ole Juulson Kvale, Minn. Independent Republican, 1923-25; Farmer Laborite, 1925-29.

Rep. Fiorello Henry LaGuardia, N.Y. Republican, 1917-19, 1923-25; Socialist, 1925-27; Republican Progressive, 1927-33.

Rep. William Lemke, N.D. Nonpartisan Republican, 1933-41; Republican, 1943-50.

Rep. Ernest Lundeen, Minn. Republican, 1917-19; Farmer Laborite, 1933-40.

Rep. Vito Marcantonio, N.Y. Republican, 1935-37; American Laborite, 1939-51.

Rep. Whitmell Pugh Martin, La. Progressive, 1915-19; Democrat, 1919-29.

Rep. John Joseph Moakley, Mass. Independent, 1973-75; Democrat, 1975- .

Rep. Henry Charles Morgan, Mo. Democrat, 1875-95; Republican, 1909-11.

Rep. James Churchill Oliver, Maine, Republican, 1937-43; Democrat, 1959-61.

Rep. Ogden Rogers Reid, N.Y. Republican, 1963-72; Democrat, 1972-75.

Rep. Franklin Delano Roosevelt, Jr., N.Y. Liberal/ Four Freedoms, 1949-51; Democrat, 1951-55.

Rep. George John Schneider, Wis. Republican, 1923-33; Progressive, 1935-39.

Rep. Isaac R. Sherwood, Ohio Republican, 1873-75; Democrat, 1907-21 and 1923-24.

Rep. Joseph Crocker Sibley, Pa. Democrat/People's Party/Prohibitionist, 1893-95; Democrat, 1899-1901; Republican, 1901-07.

Rep. Joseph F. Smith, Pa. Republican, 1981; Democrat, 1981- .

Rep. Bob Stump, Ariz. Democrat, 1976-81; Republican, 1982- . (Rep. Stump has announced that he will run as a Republican in 1982).*

Rep. Henry Wilson Temple, Pa. Progressive Republican, 1913-15; Republican, 1915-33.

Rep. Albert William Watson, S.C. Democrat, 1963-65; Republican, 1965-71.

Rep. Gardner Robert Withrow, Wis. Republican, 1931-35; Progressive, 1935-39; Republican, 1946-61.

Rep. Roy Orchard Woodruff, Mich. Progressive Republican, 1913-15; Republican, 1921-53.

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* Washington Post, October 15, 1981, A4; 39 Congressional Quarterly 2029, October 17, 1981.

APPENDIX III

POST-ELECTION CHANGES OF PUERTO RICO REPRESENTATIVES AND SENATORS FROM ONE POLITICAL PARTY TO ANOTHER

Term	Shift*
1936-1940	Rep. Rodolfo Ramirez Pabon Liberal Party to P.P.D.
1952-1956	Rep. Francisco Diaz Marchand P.P.D. to P.I.P.
1964-1968	Rep. Leopoldo Figueroa P.E.R. to P.N.P.
	Rep. Ruben Otero Bosco P.E.R. to P.N.P.
	Sen. Ruben Rivera Ramos P.E.R. to P.N.P.
1968-1972	Rep. Antonio Sagardia Sanchez P.P.D. to P.N.P.
	Rep. Esmeraldo Velez Vargas P.P.D. to P.N.P.
1972-1976	Sen. Justo Mendez P.N.P. to P.P.D.
	Rep. Carlos Gallisa P.I.P. to P.S.P.
	Rep. Luis Angel Torres P.I.P. to P.S.P.

Source: Information on File at the Puerto Rico Electoral Commission.

* The abbreviations are the Spanish acronyms for the following parties:

P.E.R.: Republican Statehood Party
P.I.P. : Independence Party
P.N.P.: New Progressive Party (NPP)
P.P.D.: Popular Democratic Party (PDP)
P.S.P. : Socialist Party

APPENDIX IV

STATE CONSTITUTIONAL PROVISIONS REQUIRING AN ELECTED LEGISLATIVE HOUSE AS OF 1787

Connecticut	Const. of 1776, ¶ 1, adopting the Charter of 1662 with its provision for an elected assembly, 2 SOURCES AND DOCUMENTS OF THE UNITED STATES CONSTITUTIONS (W. Swindler, ed. 1973) at 131, 132 (hereinafter Swindler).
Delaware	Const. of 1776, Articles III and IV.
Georgia	Const. of 1777, Article IX.
Maryland	Const. of 1776, Article II.
Massachusetts	Const. of 1780, Part II, Chapter I, Section 2, Article I and Section 3, Article IV.
New Hampshire	Const. of 1784, Part II, 6 Swindler 344, 349-50.
New Jersey	Const. of 1776, Section IV.
New York	Const. of 1777, Sections VII and XII.
North Carolina	Const. of 1776, Article III.
Pennsylvania	Const. of 1776, "Frame of Government," Sections 2 and 6.
Rhode Island	Const. of 1776, adopting the Charter of Rhode Island and Providence Plantations—1663, with its provision for an elected assembly, 8 Swindler 362, 364.
South Carolina	Const. of 1778, Articles XII and XIII.
Virginia	Const. of 1776, 10 Swindler 48, 52-53.

Appellee's Brief

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No. 81-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JESUS RIVERA RODRIGUEZ, *et al.*,

Appellants,

v.

POPULAR DEMOCRATIC PARTY, *et al.*,

Appellees.

On Appeal From
The Supreme Court of Puerto Rico

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether a statute of the Commonwealth of Puerto Rico violates the First,* Fifth or Fourteenth Amendments of the Federal Constitution because, like comparable statutes in a number of states, it provides for the filling, until the next general election, of a vacancy in the lower house of the Puerto Rican legislature by appointment rather than election?

2. Whether the Federal Constitution invalidates this statute of the Commonwealth of Puerto Rico because, like comparable statutes in a number of states, it provides that the person appointed to such vacancy shall be selected by the political party of which the deceased Representative was a member?

3. Whether, assuming that the voting rights principles of the First, Fifth and Fourteenth Amendments are to be applied to the Commonwealth of Puerto Rico precisely as they are to the States of the Union, the statute relating to the filling of vacancies, as applied in this case, is constitutional?

4. Whether in view of the unique "autonomous" status of Puerto Rico, and the special, compelling reasons for filling vacancies in the Puerto Rican legislature by appointment as provided by the Puerto Rican Constitution and statute, the Puerto Rican statute is entitled to judicial deference beyond that accorded to the States?

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* Appellants' Petition in the trial court pleaded only the Fifth and Fourteenth Amendments of the United States Constitution. (Joint Appendix, p. 44).

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS AND JUDGMENT BELOW	1
PARTIES	1
STATEMENT OF THE CASE	3
I. The Provisions for Filling Legislative Vacancies in the Various Jurisdictions	4
A. Legislators in Puerto Rico	4
B. Legislative Vacancies in the States	6
C. Legislative Vacancies in the Congress	6
II. Vacancies in Other Elective Offices	6
A. The President and Vice President of the United States	7
B. The Elected Officials of Puerto Rico Other than Legislators	8
C. The States	9
III. The Status and Electoral System of Puerto Rico	9
A. Status	10
B. Puerto Rico's Electoral System	13
SUMMARY OF ARGUMENT	16
ARGUMENT	17
I. The Filling of a Vacancy in Legislative or Other Elective Office by Appointment, Whether in the Federal or State Governments or Puerto Rico, is Not Unconstitutional	18
II. This Court's Position With Respect to State Obligations to Provide for Elections	19
III. The Method of Filling a Vacancy by Interim Appointment is Clearly Within the Discretion of the Jurisdiction	23
IV. No Question as to Equal Protection is Presented: All Voters and Political Parties are Treated Alike	25
V. The "Strict Scrutiny" Standard is Neither Relevant nor Appropriate	28

Table of Contents Continued

	Page
VI. Vesting the Power of Selection in Political Parties does not Offend the Federal Constitution, and the Interim Appointment by Political Parties is Justified by Compelling State and Puerto Rican Interests	29
CONCLUSION	36
APPENDICES:	
APPENDIX A: Judgment of the Supreme Court of Puerto Rico	1a
APPENDIX B: Constitution of the Commonwealth of Puerto Rico, Art. III, Section 8	3a
APPENDIX C: Electoral Law of Puerto Rico, Sections 5.006, 5.007, 16 L.P.R.A. Sections 3206, 3207	5a
APPENDIX D: States Requiring Legislative Vacancies to be Filled by Appointment; and States Providing Either that Appointee Shall be Selected by Predecessor's Political Party or that he Must be a Member of Same Party	7a

TABLE OF AUTHORITIES

CASES:	Page
Avery v. *Midland County*, 390 U.S. 474, 88 S.Ct. 1114 (1968)	21
Balzac v. *Porto Rico*, 258 U.S. 298, 42 S.Ct. 343 (1922)	12
Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080 (1974)	9, 12
Califano v. *Torres*, 435 U.S. 1, 98 S.Ct. 906 (1978)	10
Cintron Garcia, et al. v. *Romero Barcelo, et al.*, Civil No. 81-2407 (D.P.R.)	30
Cousins v. *Wigoda*, 419 U.S. 477, 95 S.Ct. 541 (1975)	33
Democratic Party v. *La Follette*, ____ U.S. ____, 101 S.Ct. 1010 (1981)	33
Dorr v. *United States*, 195 U.S. 138, 24 S.Ct. 808 (1904)	12
Downes v. *Bidwell*, 182 U.S. 244, 21 S.Ct. 770 (1901)	12
Examining Board v. *Flores de Otero*, 426 U.S. 572, 96 S.Ct. 2264 (1976)	9
Fortson v. *Morris*, 385 U.S. 231, 87 S.Ct. 446 (1966)	20, 27, 29
Fuster v. *Buso and the Puerto Rican Independence Party*, 102 P.R.R. 412 (Puerto Rico, 1974)	16, 34
Hadley v. *Junior College District*, 397 U.S. 50, 90 S.Ct. 791 (1970)	20, 22
Harris v. *Rosario*, ____ U.S. ____, 100 S.Ct. 1929 (1980)	9, 10
Hechinger v. *Martin*, 411 F.Supp. 650 (D.D.C. 1976), *aff'd* 429 U.S. 1030, 97 S.Ct. 721 (1977)	16, 27, 31, 34
Holt Civic Club v. *Tuscaloosa*, 439 U.S. 60, 99 S.Ct. 383 (1978)	27
Illinois State Board of Elections v. *Socialist Workers Party, et al.*, 440 U.S. 173, 99 S.Ct. 983 (1979)	22
Jackson v. *Ogilvie*, 426 F.2d 1333 (7th Cir. 1970), *cert. denied* 400 U.S. 833, 91 S.Ct. 66 (1970)	23
Kaelin v. *Warden*, 334 F.Supp. 602 (E.D. Pa. 1971)	14, 16, 25, 29, 31, 34

Table of Authorities Continued

	Page
Kramer v. *Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886 (1969)	20, 22, 27
Lo Frisco v. *Schaffer*, 341 F.Supp. 743 (D. Conn. 1972), *aff'd* 409 U.S. 972, 93 S.Ct. 313 (1972)	16, 31, 34
Minor v. *Happensett*, 21 Wall. (U.S.) 162 (1875)	19
Mora v. *Mejias*, 206 F.2d 377 (1st Cir. 1953)	11
Mora v. *Mejias*, 115 F.Supp. 610 (D.P.R. 1953)	12
Newman v. *United States ex rel. Frizell*, 238 U.S. 537, 35 S.Ct. 881 (1915)	3
Passalacqua v. *Electoral Tribunal*, 105 P.R.R. 56 (Puerto Rico, 1976)	15, 34
Patterson v. *Burns*, 327 F.Supp. 745 (D.Ha. 1971)	18
People v. *Betancourt*, 28 P.R.R. 801 (1920)	3
People ex rel. Rosario v. *Ferrer*, 47 P.R.R. 80 (1934)	3
Ripon Society, Inc. v. *National Republican Party*, 522 F.2d 567 (1975), *cert. denied* 424 U.S. 933, 96 S.Ct. 1147 (1973)	33
Rosario v. *Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245 (1973)	26, 33
Sailors v. *Board of Education*, 387 U.S. 105, 87 S.Ct. 1549 (1967)	20, 27
San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278 (1973)	19, 27
Snowden v. *Hughes*, 321 U.S. 1, 64 S.Ct. 397 (1944)	26
Storer v. *Brown*, 415 U.S. 724, 94 S.Ct. 1274 (1974)	33
Torres v. *Puerto Rico*, ____ U.S. ____, 99 S.Ct. 2425 (1979)	9
Valenti v. *Rockefeller*, 292 F.Supp. 851 (S.D.N.Y. 1968), *aff'd per curiam*, 393 U.S. 405, 89 S.Ct. 689 (1969)	6, 23, 24, 25
Williams v. *Florida*, 399 U.S. 78, 90 S.Ct. 1893 (1970)	12
Wilson v. *Oklahoma City Council*, 347 F.Supp. 306 (W.D. Okla. 1972)	18

Table of Authorities Continued

	Page
UNITED STATES STATUTES AND TREATIES	
3 U.S.C. §19	7
48 U.S.C. §892	8
Act of June 1, 1938, ch. 308, §30, 52 Stat. 595	4
Act of July 3, 1952, Public Law 447, ch. 567, 66 Stat. 327	5
The Organic Act of March 2, 1917, 39 Stat. 951	4, 13, 15
Puerto Rico Federal Relations Act of July 3, 1950, Public Law 600, 64 Stat. 320, 48 U.S.C. §731(b), *et seq.*	5, 12
PUERTO RICO STATUTES	
Electoral Law §5.006, 16 L.P.R.A. §3206	5, 8, 26, 30
Electoral Law §5.007, 16 L.P.R.A. §3207	5, 8, 30
21 L.P.R.A. §3101	8, 30
21 L.P.R.A. §3103	8, 30
21 L.P.R.A. §3057	8, 30
21 L.P.R.A. §3058	8
21 L.P.R.A. §3059	8
32 L.P.R.A. §3392	3
Statutes of Puerto Rico, Law of March 18, 1906	8
UNITED STATES CONSTITUTION	
Article I, §2, Cl. 4	23
Article I, §3, Cl. 2	6
Article II, §1, Cl. 5	7
Amendment I	10, 13, 22
Amendment V	10, 22
Amendment XIV	10, 22
Amendment XVII	6
Amendment XXV	7

Table of Authorities Continued

	Page
CONSTITUTION OF THE COMMONWEALTH OF PUERTO RICO	
Article II	13
Article III, §3	15
Article III, §7	16
Article III, §8	5
Article IV, §7	8
Article VI, §4	8
STATE STATUTES AND CONSTITUTIONS	
Conn. Gen. Stat. Ann., §9-222	9
Idaho Code, §59-906	9
Ill. Rev. Stat., Ch. 46, §25-10	9
Iil. Rev. Stat., Ch. 46, §25-11	9
Ann. Code Md., Art. 24, §15	9
N.C. Gen. Stats., §153 A-27	9
Ohio Rev. Code, §305.02	9
Ohio Rev. Code, §733.31	9
Utah Code, §17-5-4	9
Utah Code Ann., §20-1-7	9
Washington Constitution, Amendment 52	9
W. Va. Code, §10-3-7	9
LEGISLATIVE MATERIALS	
83 Cong. Rec. 7175 (1938)	4
93 Cong. Rec. 7783-84	7
Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 88th Cong., 2d Sess. (1964)	8, 18
H. Rep. No. 1262, 75th Cong., 1st Sess. (1937)	4
H.R. 3587, 79th Cong., 1st Sess. (1945)	7
S. Rep. No. 1665, 75th Cong., 1st Sess. (1938)	4
Com. S. Rep., *Diario de Sesiones*, 1964, Vol. 18, Part 3, pp. 1223 *ff.*	5

Table of Authorities Continued

	Page
MISCELLANEOUS:	
51 A.L.R.2d 1306, *et. seq.*	3
Monclova, "The Puerto Rican Political Movement in the 19th Century", in *Status of Puerto Rico*, United States-Puerto Rican Commission (1966)	14
Puerto Rican Constitutional Convention, Resolution 22	11
United Nations General Assembly Res. 748, 8 U.N. GAOR Supp. 17 (1953)	11
United Nations General Assembly Omnibus Res. A-36-L. 20, ¶5	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-328

JESUS RIVERA RODRIGUEZ, *et al.*,

Appellants,

v.

POPULAR DEMOCRATIC PARTY, *et al.*,

Appellees.

On Appeal From
The Supreme Court of Puerto Rico

BRIEF FOR APPELLEES

OPINIONS AND JUDGMENT BELOW

Appellants refer to the *per curiam* opinion of the Supreme Court of Puerto Rico and "four concurring or dissenting opinions". Official translations are printed in Appendix B of the Jurisdictional Statement ("JS"). The Judgment of the Court appears in Appendix C of JS, and, for convenience, is reprinted as Appendix A to this Brief. There were two opinions concurring in part and two dissenting opinions. (App. A).

PARTIES

Appellants are electors in District 31, affiliated with the New Progressive Party (the Pro-Statehood Party: "NPP"). They were intervenors in the Superior Court of Puerto Rico. Plaintiff-

appellee is the Popular Democratic Party (the Pro-Commonwealth Party: "PDP"). The defendants were the Governor of Puerto Rico, elected for a second term in the November 1980 election, as the NPP's nominee, and the General Elections Administrator, an official appointed by the Governor. Neither the Governor nor the Administrator has joined in the appeal to this Court.

The appeal herein is from the Judgment of the Supreme Court of Puerto Rico, affirming with modification the Judgment of the Superior Court. The Judgment appealed from required that the candidate certified by the plaintiff-appellee, the PDP, be seated as the Representative of District No. 31 until the next general election, which coincides with the expiration of the term of the deceased member, to fill the vacancy caused by the death of the latter. [1]

In their Petition to Intervene (Joint Appendix ("JA"), p. 43), appellants asserted that a by-election open to all parties, candidates and voters in District 31 should be held to fill the legislative vacancy, and that their rights to equal protection under the Fifth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Constitution of Puerto Rico were violated because the designation of the person to fill the vacancy was confined to the PDP. Appellants' appeal to this Court is based solely on the federal constitutional issues.

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[1] The Judgment provides that in the event that the PDP presented to the Administrator and the Governor a slate of more than one candidate, the Governor was required to call a "by-election," limited to the candidates named on that slate. All qualified electors in the District would be allowed to vote in that by-election, but the candidates would be only those on the PDP slate. If the slate presented by the PDP was limited to one candidate (as in fact occurred as a result of the PDP's primary election), he "shall be certified by the General Administrator of Elections as the person entitled to hold the vacant seat". (Judgment, App. A).

STATEMENT OF THE CASE

On March 22, 1981, following the favorable decision of the Superior Court of Puerto Rico, the PDP held a primary election in which four candidates ran. The victor was Juan Corujo Collazo, a member of the PDP. The Supreme Court of Puerto Rico stayed the judgment below pending its decision; after its decision on May 8, 1981, it stayed its mandate for 30 days. On June 29, 1981, this Court denied appellants' application for a further stay of the mandate, and on July 6, 1981, Mr. Corujo was sworn in as the Representative of District 31 to serve until the next general election in 1984, at which time the term of his predecessor would expire.[2]

The primary question which appellants present to this Court is the validity of the practice of filling vacancies in elected office by appointment rather than by a special election: that is, an election in which all parties, candidates and voters may participate. The second question is whether the Federal Constitution is violated by restricting the selection of the interim appointee to the political party of which the incumbent was a member. Both of these provisions have been adopted in a number of states (see *infra*), as well as in Puerto Rico under both congressional and Commonwealth enactments.

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[2] We note the existence of a question as to whether, in the posture of this case, relief may be granted to intervenors. Mr. Corujo has taken office, and under the Commonwealth Constitution, "Each house shall be the sole judge of the election returns and qualifications of its members." (Art. III, §9). In any event, effective relief must be in the nature of a *quo warranto* proceeding. Mr. Corujo is not a party to this proceeding; none of the appellants/intervenors has a personal claim to the office; under Puerto Rican law only "the Secretary of Justice . . . or any prosecuting attorney . . . may file . . . a petition for *quo warranto*. . . ." 32 L.P.R.A. §3392; see *Newman* v. *United States ex rel. Frizell*, 238 U.S. 537, 35 S.Ct. 881 (1915); *People ex rel. Rosario* v. *Ferrer*, 47 P.R.R. 80 (1934); *People* v. *Betancourt*, 28 P.R.R. 801 (1920); 51 A.L.R.2d 1306, *et seq.*

I. The Provisions For Filling Legislative Vacancies In The Various Jurisdictions

A. *Legislators in Puerto Rico*

1. The Puerto Rican legislature is presently composed of 51 Representatives and 27 Senators. Of these, 11 in each chamber are elected At-Large (island-wide); the balance are elected in the 40 House and 8 Senate electoral districts by the voters thereof.

2. The statutory provision at issue in this case is in substance identical with that prescribed by the Congress for Puerto Rico in 1938 by amendment of the then Organic Act of 1917 (the "Organic Act"). The 1917 Organic Act provided that special elections may be held to fill vacancies in the elected Senate and House of Representatives. (Act of March 2, 1917, ch. 145, §§26 and 27, 39 Stat. 958). No vacancies were filled under this provision because of the problem of holding special elections; accordingly, on recommendation of the Resident Commissioner of Puerto Rico,[3] on June 1, 1938, Congress amended the Organic Act to provide that vacancies in all legislative posts shall be filled by the Governor "upon the recommendation of the central committee of the political party of which such Senator or Representative was a member", and that such appointed person shall hold office for the remainder of the four-year term for which his predecessor was elected — that is, until the next general election. (Act of June 1, 1938, ch. 308, §30, 52 Stat. 595).

3. This provision remained in effect until the Organic Act was superseded in 1952 by the Commonwealth Constitu-

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[3] The Commissioner stated that "We have had in past years vacancies in both the [Puerto Rican] senate and the house of representatives because the municipalities and the insular government felt they could not finance a special election". (Sen. Rep. 1665, 75th Cong., 1st Sess., Cong. Rec., May 5, 1938, p. 6294; *see* also, House Rep. 1262, 75th Cong., 1st Sess., July 19, 1937; and 83 Cong. Rec. 7175 (1938)).

tion, drafted and adopted by the people of Puerto Rico pursuant to the Compact with the United States. (Public Law 600, 48 U.S.C. §731(b)). The Commonwealth Constitution continued the provision in the Organic Act for filling vacancies in the post of the At-Large Senators and Representatives; that is, that such vacancy is to be filled "upon recommendation of the political party of which the previous holder of the office was a member . . .". (Art. III, §8). Under the Commonwealth Constitution, as originally adopted, vacancies in the offices of District Representatives and Senators were to be filled in the same manner except in limited situations specifically described as to which special elections were required. (See *infra*, p. 29). On July 3, 1952, the Constitution, containing these provisions, was approved by the Congress and the President. (Ch. 567, 66 Stat. 327 (1952)). (See generally as to background, Superior Court Opinion, JS, pp. 6a *ff.*).

4. Experience with even this limited special election procedure was unsatisfactory. Accordingly, an amendment to the Constitution was proposed in 1964, adopted by the legislature of Puerto Rico and approved by the people in a referendum. This amendment repealed the provision of the Constitution for special elections in the case of district vacancies and provided instead that all vacancies in those district offices "shall be filled as provided by law." (Art. III, §8 (reprinted here as App. B)). The legislative reports and the debate make clear that the purpose of the amendment was to allow the legislature to provide for filling such vacancies by the political party to which the incumbent belonged. (Sen. Rep., *Diario de Sesiones*, 1964, Vol. 18, Part 3, pp. 1223 *ff.*; see Superior Court Opinion, JS at pp. 14a-15a). The Legislative Assembly thereafter enacted the law here in issue. (16 L.P.R.A. §§3206, 3207). (App. C hereto).

B. *Legislative vacancies in the States*

In 22 states of the Union and the District of Columbia, legislative vacancies are filled by appointment. Twenty-one states provide either that the appointee shall serve until the next general election or until the end of the term of the incumbent who vacated the office.[4] Sixteen of the 21 states provide either that the appointee shall be a member of the same political party as his predecessor, or confer the selection power upon the political party of the predecessor. (See App. D to this Brief).

C. *Legislative vacancies in the Congress*

The Constitution of the United States originally provided that in the case of vacancies in the Senate, the Executive of the State "may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies". (Art. I, §3, Cl. 2). This was superseded by Amendment XVII, providing for popular election of Senators, which authorized the legislature of any state to "empower the executive thereof to make temporary appointments" to fill a vacancy in a Senate seat "until the people fill the vacancies by election as the legislature may direct."[5]

II. Vacancies In Other Elective Offices

The proposition advanced by appellants — that there is a federal constitutional right to vote for candidates to fill a legislative vacancy — cannot be confined to the selection of legisla-

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[4] In Tennessee and the District of Columbia, the vacancy is filled by appointment, but a special election is held in certain circumstances. Most of the 21 states hold general elections every two years; but in two of the states, Indiana and Maryland, if the vacancy is in a Senate post, it is specifically provided that the appointee will serve out the full four-year term of his predecessor, even if a general election intervenes.

[5] See *Valenti* v. *Rockefeller*, 292 F.Supp. 851 (S.D.N.Y. 1968) (Three-Judge Court) *aff'd on Motion, per curiam*, 393 U.S. 405, 89 S.Ct. 689 (1969), discussed *infra*.

tors, but is applicable to a vast number and variety of other elective offices. (See *infra*).

A. *The President and Vice President of the United States*

1. The Constitution authorizes Congress by legislation to provide for succession to the office of President in case the office is vacated by both the elected President and the Vice President. (Art. II, §1, Cl. 5). The line of succession provided by the Congress (3 U.S.C. §19) is the Speaker of the House; the President *pro tempore* of the Senate; the Secretary of State; and various other cabinet officers. Upon succeeding to the office, the designated person is to act as President until expiration of the term. No provision is made for a special election, although it is possible that the non-elected President may serve for as much as a full term of four years. (3 U.S.C. §19). [6] If electors have an absolute right under the Federal Constitution to vote to fill a vacancy, this legislation is unconstitutional.

2. The Twenty-Fifth Amendment, although obviously it cannot be said to be unconstitutional, may result and has resulted in the appointment of a President and Vice President of the United States to fill vacancies in these offices, without election. Under the Twenty-Fifth Amendment the President, subject to confirmation by both houses of Congress, may *appoint* a person to fill a vacancy in the office of Vice President. The result is that the electors have no opportunity to vote for the Vice President, and the appointed Vice President may become President. In consequence, Gerald R. Ford, a Congressman from a Congressional District in Michigan became Vice President on December 8, 1973; nine months later he became President; he held the office for about two years and five months; and he appointed as Vice President, Nelson Rockefeller, who

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[6] In considering this measure, proposals for a special election were discussed and rejected. See H.R. 3587, 79th Cong., 1st Sess. (1945); 93 Cong. Rec. 7783-84.

had never been elected to any federal office. In the hearings and debate on the Twenty-Fifth Amendment, the reasons for avoiding a special election were extensively analyzed.[7] Those reasons are, as we shall show, applicable in principle to Puerto Rico.

B. *The Elected Officials of Puerto Rico Other than Legislators*

Beginning with the Organic Act of 1917, and continuing to date under the Commonwealth, a single general election is held in Puerto Rico every four years for all elective officials, both local and island-wide. (Comm. Const., Art. VI, §4). Vacancies in all elective posts are filled without a special election. Vacancies in the congressionally created office of Resident Commissioner are filled by the Governor with confirmation by the Puerto Rican Senate. (48 U.S.C. §892). If the Governor's position becomes vacant, it is filled by the Secretary of State, who is an appointee of the Governor. (Comm. Const., Art IV, §7). Since 1906, vacancies in the posts of Mayor and members of the municipal councils of the 78 municipalities are filled by appointment upon designation by the party to which the incumbent belonged. (Stat. of P.R., Law of March 18, 1906; 21 L.P.R.A. §§3057, 3058, 3059, 3101, 3103; 16 L.P.R.A. §§3206, 3207).

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[7] The requirement of a special election would represent "a new and drastic departure from our historic system of quadrennial presidential elections and would introduce various complications into our political structure", Lewis F. Powell, Jr., testifying in the 1964 Senate Subcommittee Hearings. Hearings, Senate Committee on the Judiciary, 88th Cong., 2d Sess., 94. There "would be simply too much turmoil and chaos and expense to have a special nationwide election to choose a new Vice President", Clinton Rossiter, *Id.* at 218. *See* also, *Id.*, pp. 52 (Senator Javits), 4 (Senator Bayh), 79, 89 (Report and Recommendations of the Standing Committee on Jurisprudence and Law Reform of the ABA).

C. *The States*

In many instances, vacancies in the office of elected officials of the various states, in addition to legislators, are filled by appointment of non-elected officials to serve until the next general election, or for the balance of the term of their predecessors, and in a number of instances, the law requires that the interim appointee must be of the same political party as the previous incumbent. In the following examples, for instance, a vacancy in the stated office must be filled by the political party or by a person who is a member of the same political party as the individual he replaces. *Utah:* state auditor, state treasurer and attorney general (Utah Code Ann., §20-1-7); *Illinois:* Clerk of the Circuit Court (Ill. Rev. Stat., ch. 46, §25-10); *Washington:* any county elective office (Wash. Const., Amend. 52); *Connecticut:* selectman (Conn. Gen. Stat. Ann., §9-222); *Ohio:* city and county offices of solicitor, auditor, treasurer, county commissioner, prosecuting attorney, clerk of the court, sheriff, recorder of deeds, county engineer and coroner (Ohio Rev. Code, §§305.02, 733.31). *Maryland, Utah, Idaho, Illinois, North Carolina,* and *West Virginia:* county commissioner (Ann. Code Md., Art. 24, §15; Utah Code, §17-5-4; Idaho Code, §59-906; Ill. Rev. Stat., ch. 46, §25-11; N.C. Gen. Stats., §153A-27; W.Va. Code, §10-3-7).

III. The Status and Electoral System of Puerto Rico

This Court has had occasion, in respect of other types of issues, to consider the status of Puerto Rico,[8] and it has re-

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[8] See Opinion of *Burger*, C.J., in *Torres* v. *Puerto Rico*, ____ U.S. ____, 99 S.Ct. 2425, 2428-2429 (1979); *Blackmun*, J., in *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 586-597, 96 S.Ct. 2264, 2273-2278 (1976); *Rehnquist*, J., (dissent) in *Examining Board* v. *Otero*, *Id.*, 426 U.S. at 606 *ff.*, 96 S.Ct. at 2283 *ff.*, *Brennan*, J., in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 671-74, 94 S.Ct. 2080, 2085-2087 (1974); *Marshall*, J., (dissent) in *Harris* v. *Rosario*, ____ U.S. ____, 100 S.Ct. 1929, 1930-1932 (1980).

peatedly referred to the "unique" "autonomous" status of the Commonwealth of Puerto Rico (the "Estado Libre Asociado de Puerto Rico"), created by Compact with the United States and recognized as "an autonomous political entity" by the United Nations. (See *infra*).

We agree, of course, that the voting rights of Puerto Ricans, like those of other citizens of the United States, are subject to the First and Fifth or Fourteenth Amendments of the Federal Constitution. (See *infra*). Puerto Rico's provision for filling vacancies is constitutional even if state standards are applied; but we submit that in applying these provisions to Puerto Rico, and particularly in evaluating the need or justification for Puerto Rican laws governing its political processes, this Court should accord special weight to Puerto Rico's unique, autonomous status, its history and special problems and the decisions of the Supreme Court of Puerto Rico.

This Court has held that the Congress "may treat Puerto Rico differently from States" in the distribution of welfare payments to United States citizens.[9] Certainly, the "different" status of Puerto Rico entitles it to the greatest consideration and deference with respect to the arrangements that it has provided in its Constitution and laws for structuring its electoral system.

A. *Status*

1. The Commonwealth of Puerto Rico, as this Court has stated, "occupies a relationship to the United States that has no parallel in our history".[10] (*Califano* v. *Torres, supra*, 435 U.S.

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[9] *Harris* v. *Rosario*, ___ U.S. ___. 100 S.Ct. 1929, 1930 (1980); *see* also, *Califano* v. *Torres*, 435 U.S. 1, 98 S.Ct. 906 (1978).

[10] In the Preamble to the Commonwealth Constitution which was approved by the Congress of the United States, it was recited that "the Commonwealth — 'El Estado Libre Asociado' — which 'in the exercise of our natural rights, we [the people of Puerto Rico] now create within our union with the United States of America.' It is a political entity created by the

at 3, 98 S.Ct. at 907, fn. 4). That it is an "autonomous political entity," "in the framework of the compact agreed upon with the United States" has been recognized by formal action and resolution of the United Nations [11] on the basis of representations of the United States.

Its government is the creation of its people. It was organized by them pursuant to Public Law 600 of July 3, 1950, *supra*, which, accepted by the people of Puerto Rico, was a Compact between them and the United States. It was created as "A state which is free of superior authority in the management of its own local affairs but which is linked to the United States of America. . . ." [12]

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act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the Compact." *Mora* v. *Mejias*, 206 F.2d 377, 387 (1st Cir. 1953).

[11] In 1953, the United States advised the United Nations of the change in Puerto Rico's status from a dependent or colonial-type of government to one that is "fully self-governing" and that it would no longer report as to Puerto Rico under Article 73(e) of the United Nations Charter. After long debate, in which the United States' position was bitterly attacked by the advocates of independence and representatives of Communist nations, the United Nations accepted the United States' position. Its resolution acknowledges the "status of self-government attained by the Puerto Rican people as that of an autonomous political entity". (G.A. Res. 748, 8 U.N. GAOR Supp. 17 at 26). Since the 1953 action, attacks on the bona fides of the Commonwealth arrangement, by Puerto Rican dissidents and Communist nations and satellites, are a repetitive feature of General Assembly sessions.

In the most recent action in the United Nations, on December 1, 1981, the Special Committee on the Granting of Independence to Colonial Countries "once again" urged the United States "to adopt all necessary measures for the full transfer of all powers to the people of Puerto Rico", and referred the matter to the U.N. General Assembly to examine at its next session. The General Assembly approved the report of the Special Committee. (Omnibus Res. A-36-L. 20, ¶ 5).

[12] Resolution 22, February 4, 1952, of the Puerto Rican Constitutional Convention.

2. There is and can be no doubt that the Commonwealth of Puerto Rico has "freedom from control or interference by the Congress in respect of internal government and administration . . .".[13] The Compact between the United States and the people of Puerto Rico incorporated the repeal of most of the provisions of the Organic Act of 1917, including repeal of the Bill of Rights contained therein and the provisions for local government. The provisions of the Organic Act that were continued by the Compact were directed to the interrelationships of Puerto Rico and the United States: Affirmation that Puerto Ricans are citizens of the United States; that Puerto Rico is free of United States Internal Revenue laws; that trade between the two shall be free of export duties; and that the rights, privileges and immunities of citizens of the United States shall be respected in Puerto Rico. (Puerto Rican Federal Relations Act, 48 U.S.C. §731(e)).

3. In the Insular cases, it was held that the Bill of Rights in the Federal Constitution does not apply to Puerto Rico *ex proprio vigore*, but the "fundamental" rights which the Federal Constitution provides for people are applicable.[14] Consistent with this principle, it is and has long been recognized, for example, that the right to jury trial, guaranteed by the federal Bill of Rights and applicable to the states,[15] does not apply to "unincorporated territories" including Puerto Rico.[16] On the

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[13] *Mora* v. *Mejias*, 115 F.Supp. 610 at 612 (D. P.R. 1953) (Three-Judge Court), quoted in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. at 674, 94 S.Ct. at 2087.

[14] *Balzac* v. *Porto Rico*, 258 U.S. 298, 42 S.Ct. 343 (1922); *Downes* v. *Bidwell*, 182 U.S. 244, 21 S.Ct. 770 (1901); *Dorr* v. *United States*, 195 U.S. 138, 24 S.Ct. 808 (1904). In the Organic Act of 1917, Congress included a *statutory* Bill of Rights applicable to Puerto Rico (39 Stat. 951, §2).

[15] See *Williams* v. *Florida*, 399 U.S. 78, 90 S.Ct. 1893 (1970).

[16] *Balzac* v. *Porto Rico*, *supra*.

other hand, this Court has applied to Puerto Rican residents the due process, equal protection and Fourth Amendment guarantees of the Federal Constitution to various fact situations which have been presented to it, and the First Amendment is also undoubtedly applicable to the people of Puerto Rico.

Accordingly, we do not contest the proposition that the provisions of the Federal Constitution which guarantee and protect the right of suffrage of United States citizens apply to Puerto Ricans; they are citizens of the United States and have been such since the Organic Act of 1917. These rights, it should be noted, are also fully guaranteed by Puerto Rico's own Constitution and laws, [17] and indeed, as we shall show, are fully implemented in Puerto Rican law and practice, in some respects to a degree and extent beyond that in any state. (See *infra*). Our point, however, is that in considering the justification or "compelling necessity" for various types of governmental arrangements, such as the method of filling vacancies, the federal guarantees are not to be applied to Puerto Rico in precisely the same way, or to precisely the same degree, as in the federated states.

B. *Puerto Rico's Electoral System*

1. Puerto Rico's system of filling vacancies in legislative office by the respective political parties of the incumbent serves "substantial and compelling" interests which are peculiar to the Commonwealth's situation. These interests go beyond the persuasive considerations which lie behind state adoption of similar arrangements for filling vacancies: for example, that they arise only occasionally; that it is important to fill the vacancies promptly; that special elections are expensive and

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[17] The Commonwealth Constitution contains a comprehensive Bill of Rights incorporating the principles of the United States Bill of Rights (except as to jury trials in civil cases) and various principles of more recently drafted statements of human rights. (Art. II).

present difficult problems of financing; that voter interest in special elections is apt to be minor; and that continuation of the political party balance expressed in the preceding election may more accurately reflect the desires of the electorate than the results of a special election. [18]

In Puerto Rico, all of these reasons are present; some, such as the need for stability, [19] the expense factor and the difficulty of financing special elections, especially as to some political parties and candidates, are present to a much greater degree than in the states; and there are additional needs, peculiar to the Island's realities, to which the method of filling vacancies responds. Most significantly, the method implements the Commonwealth's unique guarantee of minority party representation; this objective is and has been particularly important in Puerto Rico, far beyond its importance in any State of the Union, in order to provide a democratic forum and an outlet for the radically different views of the various political parties as to the ultimate status of Puerto Rico, and particularly for the small, but significant, Pro-Independence Party. It has increasingly served to encourage those who advocate separatism (independence) to utilize peaceful and democratic processes by affiliating with the Pro-Independence Party ("PIP") or Socialist Party rather than with the Nationalists who reject the ballot-box and resort to violence in both Puerto Rico and the United States.

2. There are two devices in the Constitution of the Commonwealth of Puerto Rico to assure representation of minority parties, even if the electoral strength of such parties is not

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[18] See statement in *Kaelin* v. *Warden*, 334 F.Supp. 602 (E.D. Pa. 1971) (Three-Judge Court).

[19] The intensity of political partisanship in Puerto Rico, centering almost exclusively on questions of ultimate status, has existed since Spanish days. See Monclova, "The Puerto Rican Political Movement in the 19th Century", pp. 1-50 in *Status of Puerto Rico*, U.S.-P.R. Commission (1966).

adequate otherwise to elect a member of the legislature, as has happened at various times.

a. The first is the provision that 11 Senators out of the total of 27, and 11 Representatives out of the total of 51 shall be elected at-large, and that *no voter may vote for more than one candidate for Senator or Representative At-Large*. (Comm. Const., Art. III, §3). This provision allows minority parties to nominate, for example, only one or a few Senators or Representatives At-Large and to concentrate their full voting strength, island-wide, on those nominees.[20] The operation of this provision has contributed to the significant fact that in every election, a minority party or parties, advocating different positions as to status, have elected one or more At-Large Senators and Representatives, thus providing an unquestionably valuable, lawful outlet for their views.[21]

Obviously, if vacancies caused by death, etc., in the At-Large offices held by a small minority party were to be filled by special election, rather than by designation of the Party, the purpose of this provision would be defeated. A minority party such as the current Pro-Independence Party, would not be able to elect its candidate in an island-wide special election to fill the single seat, in which candidates of major parties could run and all electors could vote.

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[20] This provision had its antecedent in the Organic Act of 1917, which provided for five Senators At-Large and four Representatives At-Large and specified that in the case of the four Representatives At-Large "each elector shall be permitted to vote for but one candidate". (Section 27). See *Passalacqua* v. *Electoral Tribunal*, 105 P.R.R. 56 (P.R., 1976), for description of the At-Large system.

[21] The political party advocating statehood has only recently achieved large voter support as evidenced by the NPP victories in the gubernatorial contests of 1968, 1976 and 1980. Various of its Pro-Statehood predecessors were, from time to time, distinctly minority parties.

b. The Commonwealth Constitution also contains another unique provision to assure minority party representation and avoid excessive single-party dominance. The Constitution provides that if any one party elects more than two-thirds of the members of either chamber of the legislature, the number of members of that chamber is to be increased by declaring elected a sufficient number of candidates of the minority party or parties, to be designated as At-Large members, to bring the total number of members of the minority party or parties to 9 in the Senate and to 17 in the House of Representatives. (Com. Const., Art. III, §7).[22]

Vacancies have occurred in the office of minority party representatives who held office as a result of this provision and have been filled upon designation by the minority party involved. Obviously, if a special election were to be held to fill such vacancies, the minority party would lose and the salutary purpose of the provision, so important in view of Puerto Rican realities, would be aborted.

SUMMARY OF ARGUMENT

I.

Twenty-one states, as well as Puerto Rico, provide for filling vacancies in the legislature by appointment until the next general election or the end of the incumbent's term, without a special election. Sixteen of these, and Puerto Rico, provide that the

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[22] This provision, restricting electors to voting for only one At-Large candidate, was attacked as a violation of the guaranteed rights to freedom of political expression and association and the one-man, one-vote rule and its constitutionality was upheld by the Supreme Court of Puerto Rico in *Fuster* v. *Buso and the Puerto Rican Independence Party*, 102 P.R.R. 412 (1974). Provisions to similar effect have been upheld in *Kaelin* v. *Warden*, 334 F.Supp. 602 (E.D. Pa. 1971); *Hechinger* v. *Martin*, 411 F.Supp. 650 (D. D.C. 1976), *aff'd* 429 U.S. 1030, 97 S.Ct. 721 (1977); *Lo Frisco* v. *Schaffer*, 341 F.Supp. 743 (D. Conn. 1972), *aff'd* 409 U.S. 972, 93 S.Ct. 313 (1972), see *infra*.

appointee shall be selected by or shall be a member of the same political party as the legislator who vacated the office. Additionally, the same provisions are made for filling vacancies in many other non-legislative elective offices in the states as well as in Puerto Rico.

II.

The Federal Constitution does not require the election of state legislators. The very narrow provision here for the filling of vacancies by interim appointment, on designation of the political party, only until the next general election, does not violate the Federal Constitution, is well within state authority, and is justified by important state interests; it provides a means for meeting the occasional and unforeseeable problem of filling vacancies in a practical and prompt manner that reflects the political choice made by the electors in the preceding general election without violating any federally protected rights of any electors.

III.

Neither the Equal Protection Clause nor any other federally guaranteed rights of electors are violated or implicated by the method of filling vacancies in this case. All voters and all political parties are treated alike.

IV.

Because of Puerto Rico's unique status as an "autonomous political entity" associated with the United States "in the framework of the compact agreed upon with the United States", its internal governmental arrangements are entitled to deference and to latitude even beyond that accorded the States; they are subject to federal challenge only if they result in pervasive, discriminatory or other fundamental violations of the rights of Puerto Ricans as citizens of the United States under applicable federal constitutional provisions.

ARGUMENT

I. The Filling of a Vacancy in Legislative or Other Elective Office by Appointment, Whether in the Federal or State Governments or Puerto Rico, is Not Unconstitutional

As we have shown, statutes and constitutional provisions for filling vacancies in elective office by appointment, without submitting the choice of the interim successor to the electorate, are pervasive throughout the Nation.[23] Their basic justification is that they reflect an acceptable choice by the jurisdiction concerned as to whether an interim election should be held.[24]

Appellants urge this Court to declare the vacancy statute of the Commonwealth of Puerto Rico, enacted pursuant to its own Constitution, invalid on grounds that would invalidate such laws and constitutional provisions throughout the Nation. Their contentions are as follows: (1) that "This Court has affirmed the principle that, under our representative form of government, members of the State legislature must be elected by the voters of the State" (Appellants' Br., pp. 6, 14-24) - a proposition which

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[23] "Appointment to fill a legislative vacancy is a well-recognized practice in American law. It is a reasonable and necessary procedure to cope with an emergency situation and, as such, is well within the constitutional boundary of the state's power to regulate elections." *Patterson* v. *Burns*, 327 F.Supp. 745 at 752 (D. Ha. 1971) (Three-Judge Court) (vacancy in State Senate); *Wilson* v. *Oklahoma City Council*, 347 F.Supp. 306 at 308 (W.D. Okla. 1972) (vacancy in elective city council may be filled by appointment).

[24] A realistic summary was stated by James C. Kirby, Jr., former Chief Counsel to the Senate Subcommittee on Constitutional Amendments, with respect to S.J. Res. 139, which became the Twenty-Fifth Amendment:

> "The obvious disadvantage is that both [President and Vice President] could be nonelected officials, but we wrestle in an area here where there are no good solutions. The nature of the problem is such that any solution is going to be partially undesirable, and one must choose between conflicting considerations and accept the fact that any proposal is going to be subject to some disadvantage and criticism." (Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 88th Cong., 2d Sess. 49 (1964)).

is clearly *contrary to this Court's decisions*, as we shall show; (2) that the appointment of a person to the remainder of a legislative term (which in Puerto Rico coincides with the next general election) violates the Equal Protection Clause because the voters of the affected District will be represented by an appointed legislator whereas voters in other Districts will be represented by an elected legislator (*Id.*, pp. 7-8, 24-26) - a proposition which has nothing to do with the "equal protection" principle; (3) that by vesting power to appoint the interim successor in the political party to which the incumbent belonged, voters in the District who do not belong to that party are excluded in violation of the Equal Protection Clause (*Id.*, pp. 8, 26-31) - an objection which equally applies to any method of appointment by a politically-affiliated official; and (4) that "the burdens upon appellants' constitutional rights" are not justified by any compelling governmental interest (*Id.*, pp. 8-9, 32-42). We shall address these arguments.

II. This Court's Position With Respect to State Obligations to Provide for Elections

Neither this nor any other federal court to date has ever held that the Federal Constitution requires a state to elect rather than appoint members of its legislature or any of its officials; the holding in *Minor* v. *Happensett*, 21 Wall. (U.S.) 162, 178 (1875), is the law: that the Federal Constitution "does not confer the right of suffrage upon anyone" (although it is clear that *if* the state (or Puerto Rico) provides for elections and grants the right of suffrage, the guarantees of the Federal Constitution come into play to forbid denials of equal protection or the right of political association as guaranteed by the First, Fifth and Fourteenth Amendments). This principle has been recently reiterated by this Court. For example, in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278 (1973), the Court, per Powell, J., said that "the right to vote, *per se*, is not a constitutionally protected right". (411 U.S. at

35, 93 S.Ct. at 1298, fn. 78). In a concurring opinion, Justice Stewart stated that the equal protection right of qualified voters is conferred "whenever the State *has adopted* an electoral process for determining who will represent any segment of the State's population". (411 U.S. at 59, 93 S.Ct. at 1310, fn. 2). (Emphasis supplied). In dissenting (with Justice Douglas), Marshall, J., stated that "the right to vote in state elections has itself never been accorded the stature of an independent constitutional guarantee". (411 U.S. at 101, 93 S.Ct. at 1331).

In *Fortson* v. *Morris*, 385 U.S. 231, 87 S.Ct. 446 (1966), this Court sustained a Georgia constitutional provision providing that if no candidate for Governor received a majority of the votes, the legislature shall elect a Governor from the two persons receiving the highest number — a provision which would permit the legislature to appoint the candidate receiving *fewer* votes than his opponent. In his opinion for the Court, Justice Black stated that "There is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor." (385 U.S. at 234, 87 S.Ct. at 448).[25]

The constitutional point is illustrated by a comparison of *Sailors* v. *Board of Education*, 387 U.S. 105, 87 S.Ct. 1549 (1967), with *Hadley* v. *Junior College District*, 397 U.S. 50, 90 S.Ct. 791 (1970). In *Sailors*, this Court *rejected* an equal protection and "one-man, one-vote" attack upon a state statute providing for the *appointment* of members of a County Board. In *Hadley*, this Court *applied* the equal protection clause and invalidated a statute providing for *election* of trustees of the Junior College District because of failure to accord proportional voting power to more populous units in the District. In *Hadley*, the Court (Black, J.) expressly distinguished *Sailors* on the

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[25] *Cf.*, *Kramer* v. *Union Free School District*, 395 U.S. 621, 629, 89 S.Ct. 1886, 1890 (1969).

basis that the state in *Sailors* "[chose] to select members of an official body by appointment rather than election, . . .". (397 U.S. at 58, 90 S.Ct. at 796).

Even if the law were otherwise, and even if elections were required by the Federal Constitution, appellants could not prevail; it does not follow, even if elections were required in the first instance, that the states would be prohibited from meeting the occasional situation of a vacancy by interim appointment until the next general election. Appellants, however, invite this Court to deprive the states of the right to make practical provision for an unusual occurrence. The implications of the invitation are indeed vast. Twenty-one state legislatures provide for such appointment, without a special or interim election. (App. D). The federal courts' entry into this field obviously cannot stop with state legislatures. Other elective state and local bodies that exercise legislative powers [26] necessarily would be subject to the same rule; the alleged right to elect persons to fill vacancies, if it is decreed, would apply, as do the voting rights rules heretofore established, to municipal councils, county commissioners and the myriad bodies in the complex of state and local agencies that have legislative or law-making powers. [27]

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[26] For example, municipal councils or commissions; school districts; some county commissioners; and various boards with law-making powers.

[27] Indeed, at the threshold, this Court and the lower federal courts would be faced with the problem of deciding which of the myriad and diverse governmental agencies exercise powers which require that they be classified as legislative for the purpose. The difficulty of this determination is manifest in the decisions of this and other federal courts on a variety of issues. *See, e.g.*, the various opinions in *Avery* v. *Midland County*, 390 U.S. 474, 88 S.Ct. 1114 (1968).

Beyond this, as this Court has held, the line cannot be drawn at members of bodies that have "legislative" powers.[28] The right to vote, we submit, is as "fundamental" with respect to countless executive and elected judicial offices as it is to legislatures; and this Court has, with equal force, applied the constitutional protections of the First, Fifth and Fourteenth Amendments to elections for non-legislative posts.[29] And certainly, for example, in Puerto Rico, the office of the Representative of District 31, in the 51-member lower chamber, is of less importance to an elector than that of Governor; in the states, a voter's right to express his choice for President of the United States is no less precious and no less fundamental to the rights of each citizen than his right to vote for a single Congressman from his district; the right to vote for Mayor in many jurisdictions is hardly of less significance than the right to vote for a member of the City Council or a County board possessing legislative powers.

Indeed, appellants' argument does not even make any exception for the temporary filling of vacancies by appointment pending a subsequent special or regular election, however brief the time period may be, nor do we believe that any such

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[28] This Court has held that: "When a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator. While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process." *Hadley* v. *Junior College District*, 397 U.S. at 54-55, 90 S.Ct. at 794 (1970); *Kramer* v. *Union Free School District, supra*.

[29] *See, e.g., Illinois State Board of Elections* v. *Socialist Workers*, 440 U.S. 173, 99 S.Ct. 983 (1979) (election of Mayor).

distinction as to the application of federal constitutional guarantees can appropriately be made. We respectfully suggest that this Court should not enter, and should not thrust the lower federal courts into, the thicket of deciding, for example, that a state statute providing for interim appointment until the next general election is constitutional if the incumbent dies 29 months before that election, as in *Valenti* v. *Rockefeller, infra;* but if the incumbent dies 48 months before the election, the law is unconstitutional.

We emphasize that the only issue here presented is whether a state (and the Commonwealth of Puerto Rico, subject to the greater latitude that should be given to it), without violating federal guarantees, may provide a system which does not invoke the election mechanism for the filling of vacancies caused by death, resignation, or removal of the incumbent, *until the next general election*. The right of electors to vote in a general election for members of a state legislature is not here in issue; nor is the constitutionality of a provision — if any were enacted — that state legislatures be constituted by appointment, rather than election.

III. The Method of Filling a Vacancy by Interim Appointment is Clearly Within the Discretion of the Jurisdiction

Appellants cite no case, and we know of none, in which a statute providing for the filling of a vacancy in elective office has been declared invalid on federal constitutional grounds.[30]

The issue of an interim appointment pending a special election was before this Court in *Valenti* v. *Rockefeller*, 292 F.Supp. 851 (S.D.N.Y. 1968) (Three-Judge Court), *aff'd on*

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[30] *Jackson* v. *Ogilvie*, 426 F.2d 1333, 1336 (7th Cir. 1970), *cert. denied* 400 U.S. 833, 91 S.Ct. 66 (1970), dealt with the Federal Constitution's unqualified requirement that in case of a vacancy in the federal House of Representatives, the Governor of the State must issue a call for a special election. (U.S. Const., Art. I, §2, Cl. 4).

Motion, per curiam, 393 U.S. 405, 89 S.Ct. 689 (1969). The issue arose as a result of the death of Senator Robert F. Kennedy in June, 1968. Acting under a New York statute, the Governor appointed a person to fill the vacancy until the general election in 1970 — 29 months after the vacancy occurred. Plaintiffs were voters who attacked the statute, as applied, on the grounds that it violated the Seventeenth Amendment's provision that in the event of a vacancy in the position of United States Senator, the Governor shall issue writs of election, but that the legislature of any state may empower the executive to make temporary appointments until the election.

The New York statute required that, following an interim appointment, the vacancy election be held in even-numbered years, which here meant 1970. Plaintiffs contended that the constitutional provision required that the election be held not later than in 1969, when a state-wide election was also held. The Three-Judge Court, in an illuminating opinion by Chief Circuit Judge Lumbard, upheld the constitutionality and validity of the New York law (Frankel, J., dissenting). He pointed out the justification for the statute: that voter interest is at its height in even-numbered years when all members of the House of Representatives and the President or Governor are elected (*Id.* at 859); he pointed out the difficulty of financing a senatorial campaign in the off-years (*Id.* at 859). He noted that at various times following 1913, when the Seventeenth Amendment was adopted, 40 states, "in light of their experience" in filling senatorial vacancies, provided for appointments subject to elections to be held only in conjunction with biennial congressional elections. (*Id.* at 858 and 859). He pointed out that in this Court's voting rights cases, the "need for innovative judicial intervention was at a maximum for the political process had consigned a minority of a state's citizens to a *permanent* position of inferiority with no real hope of legislative redress." (*Id.* at 867). (Emphasis supplied). But he observed that "In this case we are confronted with no fundamental imperfection in the

functioning of democracy. No political party or portion of the state's citizens can claim that it is permanently disadvantaged . . . or that it lacks effective means of securing legislative reform if the statute is regarded as unsatisfactory". (*Id.* at 867). Accordingly, the complaint was dismissed. This Court, on Motion, affirmed, *per curiam*. (393 U.S. 405, 89 S.Ct. 689 (1969)).

IV. No Question as to Equal Protection is Presented: All Voters and Political Parties are Treated Alike

Appellants' equal protection arguments are obviously inapposite and fallacious. We agree that the equal protection clause applies to the protection of the franchise in the Puerto Rican electoral process, but there is no possible claim of a denial of equal protection in the present case. The impact of the vacancy-filling procedure is the same upon all voters and upon all political parties.

Appellants' contrived argument is that since District 31, for the interim period, will be represented by an appointed Representative while all other districts are represented by an elected Representative, the equal protection clause is violated. (Appellants' Br., pp. 7-8, 24-26). This is obviously fallacious. The equal protection clause "contemplates persons and classes of persons", and applies to discrimination among them; it does not require uniformity as between districts. [31] Puerto Rico's statute applies uniformly to voters and political parties; none is singled out for special treatment; and it applies uniformly to all districts.

For example, precisely the same situation as is presented in this case arose in Puerto Rico in 1979, as a result of the

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[31] *Kaelin* v. *Warden*, 334 F.Supp. 602, 608 (E.D. Pa. 1971) (Three-Judge Court).

resignation of the Representative of District 40, a member of the NPP, the party to which the then and present Governor and the appellants herein belong. Pursuant to the statute here in issue, a primary election was convoked "among the candidates affiliated with the New Progressive Party." (JA, p. 27). The primary was not held since all but one candidate withdrew, and the person certified by the NPP was sworn in as the successor to the resigned member. [32] (See JA, pp. 23, 26, 31, 33). This is precisely the procedure followed in the instant case.

The scope of the equal protection clause in voting rights cases has been defined by this Court as embracing invidious, purposeful, arbitrary and capricious discrimination having a "permanent" — i.e., pervasive — effect among persons and classes of persons with respect to their right to vote for particular offices, and unjustified by a permissible and compelling state interest. [33] In *Rosario* v. *Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245 (1973), this Court (per Stewart, J.) characterized the cases in which the Court has struck down voting rights provisions as ones in which "the State totally denied the electoral franchise to a particular class of residents . . .". (410 U.S. at 757, 93 S.Ct. at 1249). In that case, as in others, this Court refused to hold that state laws violated equal protection where those statutes had the effect of depriving some voters of their franchise in the selection of particular representatives, not as a result of a discriminatory or arbitrarily exclusionary formula,

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[32] It is only if the vacancy is that of an independent — i.e., non-affiliated — Representative or Senator that a special election rather than party selection is required. (16 L.P.R.A. §3206). — Obviously, party appointment is not possible if the incumbent does not belong to a party. — No "independent" — i.e., non-affiliated — person has ever been elected to the legislature of Puerto Rico.

[33] *Snowden* v. *Hughes*, 321 U.S. 1, 64 S.Ct. 397 (1944).

but as a consequence of the state's rational arrangements for the ordering of the state's governmental and electoral processes. [34]

This Court has overruled claims of the denial of equal protection when it has been raised in connection with the selection of officials by appointment rather than election. [35] Appellants seem to suggest, however, that since Puerto Rico has provided for the election of members of its legislature, equal protection requires that the jurisdiction must provide for election of persons to fill vacancies. They base their statement upon cases which hold that when and if a state provides for election of members of an agency, equal protection guaranties are applicable even though the state might, if it chose, have made the office appointive rather than elective. *Kramer* v. *Union Free School District*, 395 U.S. at 629, 89 S.Ct. at 1890. (Appellants' Br., p. 24). We, of course, do not challenge *Kramer's* holding; but appellants' suggestion is a *non sequitur;* it assumes the basic issue: that electors have a federal constitutional right that states *must* provide that vacancies be filled by election; that a state may not provide for filling a vacancy to elective office by interim appointment — the very point at issue here. The fact that a state has made an office elective does not mean that it cannot provide for filling a vacancy by interim appointment. A state's choice of the election mechanism does not preclude the appointment method for filling a vacancy. A state's decision to use appointment to fill a vacancy until the next general election, and thus to meet an occasional, limited situation, is well within the state's right to provide for its own government, and the Puerto Rican statute for doing so is neither discriminatory nor a violation of equal protection nor otherwise offensive to federal constitutional provisions.

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[34] *Cf., Holt Civic Club* v. *Tuscaloosa*, 439 U.S. 60, 99 S.Ct. 383 (1978); *Hechinger* v. *Martin*, 411 F.Supp. 650 (D. D.C. 1976) (Three-Judge Court), *aff'd* 429 U.S. 1030, 97 S.Ct. 721 (1977).

[35] *Sailors* v. *Board of Education, supra; Fortson* v. *Morris, supra.*

V. The "Strict Scrutiny" Standard is Neither Relevant nor Appropriate

Appellants' Brief is replete with invocation of the "strict scrutiny" standard. This standard has no applicability or relevance to the present issue; in fact, the relevant standard of review is at the other extreme of the "spectrum of standards" which define the degree of stringency with which this Court will "scrutinize particular classifications" and command adherence thereto. [36] "Strict scrutiny" is reserved for cases involving laws that are invidiously discriminatory with respect to "suspect" classifications, or which directly and permanently deprive persons of rights or liberties which are fundamental in respect of their nature and the permanence or pervasiveness of their impact; [37] it states a standard that is to be applied to determine the impact of constitutional precepts *if and after* a determination is made that the law invidiously and purposefully discriminates against classes entitled to protection in the circumstances. Neither of those exists in the present case; appellants' argument merely begs the question. On the contrary, we suggest that statutes in which the state prescribes the filling of state vacancies by interim appointment until the next general election, are entitled to a large, if not practically total, degree of latitude in the application of federal constitutional standards. The Constitution commits such matters of practical governance to the states; vacancies present an essentially practical problem of operating a government, and its resolution is temporary and *ad hoc*.

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[36] See Justice Marshall's analysis, dissenting (with Douglas, J.), in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. at 99, 93 S.Ct. at 1330, *et passim*.

[37] *Cf.*, *e.g.*, Justice Powell's analysis for the Court in the *San Antonio Independent School District* case, *supra*, 411 U.S. at 29, 93 S.Ct. at 1295, *et passim*.

VI. Vesting the Power of Selection in Political Parties does not Offend the Federal Constitution, and the Interim Appointment by Political Parties is Justified by Compelling State and Puerto Rican Interests

The fact that the Puerto Rican statute provides that the selection of the persons to fill vacancies, in substance, shall be made by the politcal party to which the incumbent belonged is not constitutionally offensive. It is a practice which a number of states have adopted; it is deeply rooted in the basic laws applicable in Puerto Rico, dating back to the 1938 amendment of the Organic Act of Puerto Rico; it does not discriminate against any voters or political parties; and it is essential to the preservation of Puerto Rico's system of assuring minority party representation — a system which has special and profound importance in the troubled political life of the island. (See *supra*, pp. 14-16).

1. Assuming, as we have shown, that there is no federal constitutional right of electors that vacancies be filled by election, the method of interim appointment is a matter for state decision and is not, within any practically foreseeable limits, offensive to the Federal Constitution. [38]

2. In Puerto Rico, the 1938 congressionally enacted amendment to the Organic Act provided that legislative vacancies shall be filled by the Governor "upon the recommendation of the central committee of the political party of which such Senator or Representative was a member". The Commonwealth Constitution, prior to 1964, as approved by Congress, similarly provided for filling vacancies in the post of Senator or Representative At-Large upon recommendation of the political party, specifying that the person selected be chosen by the political party in the same manner in which his predecessor was selected. The same provision was made for vacancies occurring in the

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[38] See *Fortson* v. *Morris*, 385 U.S. 231 at 234, 87 S.Ct. 446 at 448 (1966) (quoted *supra*, p. 20); *see* also, *Kcelin* v. *Warden*, discussed *infra*, 334 F.Supp. at 607 (E.D. Pa. 1971) (Three-Judge Court).

offices of District Senators and Representatives within 15 months prior to a quadrennial general election. Vacancies occurring in the office of District Senator or Representative more than 15 months prior to a general election were to be filled by special election, subject to an interim appointment upon the recommendation of the political party if the legislature was in session.

In 1964, the Constitution was amended with the approval of the Puerto Rican electorate. This amendment, which is now in effect, retained the original constitutional provision for filling vacancies in the office of a Senator or Representative At-Large: that is, "upon recommendation of the political party to which belonged the Senator or Representative causing the vacancy, with a candidate selected in the same manner as that in which his predecessor was selected". [39]

As to District Senators and Representatives, the amendment substituted a provision that any "such vacancy shall be filled as provided by law". [40] Pursuant to this provision, a statute similar to the one here in issue was enacted in 1965. That statute was superceded by the Electoral Law of 1977, which contains the provision involved in the present litigation. (16 L.P.R.A. §§3206, 3207).

Similar provision is made in Puerto Rico for party selection of the appointee to fill a vacancy in the office of Mayor of the 78 Municipalities (21 L.P.R.A. §§3101, 3103) and members of the 78 Municipal Assemblies. (21 L.P.R.A. §3057(c)).

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[39] Appellants' theory would apply to this provision of the Constitution. Litigation, tracking appellants' arguments herein, has been instituted in the Federal District Court in Puerto Rico, in circumstances similar to the statutory challenge in this case, challenging this constitutional provision for filling an At-Large vacancy. *Cintron Garcia, et al.* v. *Romero Barcelo, et al.*, Civil No. 81-2407 (D.P.R.).

[40] Appendix B hereto.

3. As we have shown, *supra*, 16 states and the District of Columbia provide that legislative vacancies must be filled by appointment of a member of the incumbent's political party or upon designation by that political party. State laws contain the same provision for political party designation with respect to many local offices having legislative or other powers.

4. This practice of placing the designation of interim appointees in the hands of the political party was directly sustained in *Kaelin* v. *Warden, supra*. This case, which is instructive of many aspects of the present appeal, involved two issues: First, an equal protection and First Amendment challenge was made to a statute restricting each elector to vote for only two of three County Commissioners. The court held that the equal protection clause applies to the election of County Commissioners because of their important governmental functions (at 604), but that it was not offended by the restriction that electors may vote for only two of the three posts. The court so held because each voter has the same power, and the provision at issue was designed to assure minority representation.[41] Second, one of the elected Commissioners had resigned; the statutory provision for filling the vacancy provided that appointment to fill the vacancy was to be made by the Court of Common Pleas and not by special election, *and that the appointee had to be a member of the same political party as his predecessor*. Its constitutionality was challenged on equal protection and Fourteenth Amendment grounds. The Court (Seitz, C.J.) held that the provision confining appointment to the same political party did not offend the Constitution: that it provided continuity of the political representation reflecting the results of the election; that it maintained orderly administration without a hiatus in operation; and that political party continuity was

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[41] To the same effect is *Lo Frisco* v. *Schaffer, supra*, and *Hechinger* v. *Martin, supra*.

necessary to maintain the scheme of minority-representation (at 607).

These same considerations are basic factors in the Puerto Rican system: political party designation to fill a vacancy is necessary to maintain the choice of policies expressed by voters in the election; relatively few voters are likely to participate in a special election; and the method of appointment by political parties is essential to carry out the highly important purpose of minority representation.

5. The power of appointment must be vested somewhere. If it is vested in the Governor, his choice is almost certainly as apt to be partisan as if vested in the political party; and additionally, occasions will arise, as here, where the result of appointment by the Governor will be to *defeat* the voters' will as to the composition of the legislature, as expressed in the election. Here the Governor is head of the NPP (Pro-Statehood Party); the deceased Representative was a member of the PDP (Pro-Commonwealth Party); the PDP controls the House of Representatives by one vote; appointment by the Governor would not only override the voters' choice of a PDP Representative,[42] but it would change the control of the House of Representatives.

6. This Court has repeatedly recognized and emphasized the "essential functions" and importance of political parties in

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[42] Appellants persist in saying that the deceased Representative here was not elected "by the PDP as a separate entity, or even by its membership alone". (Appellants' Br., p. 41). There is no basis for this. Some voters, instead of marking their ballot solely on the PDP party line, also or separately marked their ballot for Representative Muniz. Muniz ran on the PDP ticket. There is no basis for suggesting that the voters who elected Muniz were not members of the PDP, or that the choice of the voters was other than to be represented by a member of the PDP.

the operation of our democratic system;[43] and it has explicitly recognized the substantial state interest in encouraging stability of party representation.[44]

7. There are special, unique and compelling reasons for Puerto Rico to provide for the interim filling of vacancies by the incumbent's political party, as we have outlined *supra*. The nature of political campaigns, based as they are on strongly-held views as to political status, and the special need for stability, including stability of party alignment between quadrennial general elections, are and since early days have been compelling reasons for Puerto Rico's system. The expense of political campaigns is a factor of unusual significance in Puerto Rico. Most significant is the fact that the Puerto Rican system, from the Organic Act of 1917, to the present, has recognized the special importance in Puerto Rico of providing for minority representation. In part, this has been grounded, as we have described, upon the wise recognition of the importance of providing legislative representation for independence advocates as an alternative to their adherence to the often violent program of the Nationalists. In part, it is due to the concern, which was dramatically present from about 1944 to about 1964 when the PDP was dominant under Luis Munoz Marin, that one party would obtain a virtual monopoly of legislative seats.

The peculiar, adverse and fundamental impact in Puerto Rico of requiring election, instead of political party designation, of

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[43] *Democratic Party* v. *La Follette*, ___ U.S. ___, 101 S.Ct. 1010, 1019 (1981); *see* also, *Cousins* v. *Wigoda*, 419 U.S. 477, 95 S.Ct. 541 (1975); *Ripon Society, Inc.* v. *National Republican Party*, 525 F.2d 567 (1975), *cert. denied* 424 U.S. 933, 96 S.Ct. 1147 (1973).

[44] *Storer* v. *Brown*, 415 U.S. 724, 729, 94 S.Ct. 1274, 1278, 1282 (1974); *Rosario* v. *Rockefeller*, 4210 U.S. 752, 93 S.Ct. 1245 (1973).

persons to fill legislative vacancies, is easily seen by considering the following:

a. The election of 11 At-Large Senators and 11 At-Large Representatives, with the proviso that an elector may vote for only one in each category, has resulted in the ability of minority parties to elect At-Large Senators and Representatives. This has at times benefitted the Pro-Statehood parties and the Pro-Independence Party, although in some instances they would not otherwise have elected a single Representative.[45] (See *supra*, pp. 14-15). In the event of a vacancy filled by an election, it is obvious that a minority party such as the Pro-Independence Party would lose the vacated seat.

b. Puerto Rico's Commonwealth Constitution contains a unique system for enlarging the number of members of each chamber of the legislature in the event that any one party obtains more than two-thirds of the seats. (See *supra*, pp. 15-16). The increased seats are awarded to minority party candidates, as Senators or Representatives At-Large, who would not otherwise be seated. The system was attacked as in violation of equal protection and the one-man, one-vote rule and upheld by the Supreme Court of Puerto Rico in an opinion which sheds light on the operation and importance of the system.[46]

c. The provision for filling vacancies by political party appointment is a necessary corollary of this valuable system. If a special election were required to fill vacancies in posts held by the Pro-Independence or other minority parties, the representation guaranteed to them by these wise provisions would obviously be *pro tanto* defeated.

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[45] This system was challenged in *Passalacqua* v. *Electoral Tribunal*, *supra*, and its legality was sustained by the Supreme Court of Puerto Rico. *See* also, *Kaelin* v. *Warden*, *Lo Frisco* v. *Schaffer* and *Hechinger* v. *Martin*, *supra*.

[46] *Fuster* v. *Buso and the Puerto Rican Independence Party*, *supra*.

8. As we have described above, governmental and economic reasons for restricting elections to every four years are unusually compelling in Puerto Rico. Its poverty is well-known; the need for relative freedom from the pressures of political campaigns in the intervening years is unusually compelling; the passions aroused by elections, which are dominated by the statehood/assimilation, commonwealth/autonomy, and independence/separatist conflicts, are profoundly divisive.

CONCLUSION

We respectfully submit that the Puerto Rican statute for filling vacancies is well within its powers and is entitled to deference; it operates equally and without discrimination among persons or parties; there are compelling reasons for the statute; and no voter's rights under the Federal Constitution are infringed by it. This Court should not invalidate Puerto Rico's arrangements for the governance of its electoral system, made pursuant to its Constitution and the self-governing powers which it undoubtedly possesses as a result of its Compact with the United States which, to this date, is fully credited by the United Nations despite challenges to its good-faith and integrity.

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Appendix

APPENDIX A

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

0-81-150
R-81-118

POPULAR DEMOCRATIC PARTY,
Plaintiff and appellee

v.

CARLOS ROMERO BARCELO *et al.*,
Interveners and appellants

POPULAR DEMOCRATIC PARTY,
Plaintiff and appellee

v.

CARLOS ROMERO BARCELO,
GOVERNOR OF PUERTO RICO,
Defendant and appellant

GERINELDO BARRETO PEREZ, etc.
Defendant and appellee

JUDGMENT

San Juan, Puerto Rico, May 8, 1981

Pursuant to the foregoing per curiam opinion, judgment is rendered modifying the judgment below in order to give appellee a thirty-day term from the service of notice of this judgment to present before the Commonwealth Elections Commission a slate to fill the vacancy in Representative District No. 31. If said slate is limited to only one candidate, he shall be certified by the General Administrator of Elections as the person entitled to hold the vacant seat. If the slate includes more than one candidate, the Governor shall, within a

fifteen-day term after the presentation of the slate, call a by-election where only the persons mentioned in the slate may run for office, without the participation of candidates of other parties or of independent candidates. If the appellee does not present a slate within the above-mentioned thirty-day term, the Governor shall, within the next fifteen days after the term has expired, call a by-election where persons affiliated to any political party or independent candidates who meet the office's requirements, may run for office. In the event that there is a by-election, all qualified electors of Representative District No. 31 shall be entitled to vote. The by-election shall be held within a forty-five-day term from the call issued by the Governor.

It was so agreed and ordered by the Court and certified by the Clerk. Mr. Justice Rigau concurs with the opinion of the Court but reserves his right to pronounce himself if he deems it necessary because he believes that, if we are dealing with the substitution of an elected representative who died, both the slate and the voters should be members bona fide of the party to which the deceased representative belonged. Mr. Justice Irizarry Yunque concurs with the opinion but issued a separate opinion where he states that only the electors of the party which won the vacant seat should be entitled to participate in the by-election. Mr. Justice Davila issued a separate opinion concurring in part with the opinion of the Court. Mr. Justice Martin issued a dissenting opinion. Mr. Justice Negron Garcia, with whom Mr. Justice Martin joined, issued a dissenting opinion.

LRC/hvp

[SEAL]

APPENDIX B

Constitution Of Puerto Rico,
Art. III, §8
As amended 1964

[Terms of office; vacancies]

The term of office of Senators and Representatives shall begin on the second day of January immediately following the date of the general election on which they shall have been elected. If a vacancy occurs in the office of Senator or Representative for a district, such vacancy shall be filled as provided by law. When the vacancy occurs in the office of a Senator at Large or a Representative at Large, the presiding officer of the appropriate house shall fill it, upon recommendation of the political party to which belonged the Senator or Representative causing the vacancy, with a candidate selected in the same manner as that in which his predecessor was selected. A vacancy in the office of a Senator or Representative at Large elected as an independent candidate, shall be filled by an election in all districts. [As amended by the voters at a referendum held Nov. 3, 1964.]

APPENDIX C

Electoral Law of Puerto Rico
§§5.006, 5.007, 16 L.P.R.A.

§3206. By-elections

When a vacancy occurs in the office of a senator or representative elected as an independent candidate for a district, or when a vacancy occurs in the office of senator or representative for a district, nominated by a party before the fifteen (15) months immediately preceding the date of the following general election, the Governor, with the advice of the Commission shall, within the thirty (30) days following the date on which the vacancy occurred, call a by-election in such district which shall be held no later than ninety (90) days after the date of the call, and the person elected in such by-election shall hold the office until the term of his predecessor has expired.

If within sixty (60) days following the date such vacancy arises, the party to which the legislator of the vacant office belonged has not presented a candidate to fill such office, the office shall be deemed to be that of an independent legislator, to the effects of holding the by-election to fill it.

In the event the vacancy is that of an independent candiate, any elector affiliated to a political party or duly qualified as an elector, who fulfills the requirements of such office, may be presented as a candidate in said election.

Whenever a vacancy occurs in the office of a senator or representative-at-large who had been nominated by a party, or when, within the fifteen months preceding a general election a vacancy occurs in the office of senator or representative of a district, it shall be filled by the President of the proper Body by nomination of the political party such senator or representative belonged to, with a person selected in the same manner as his predecessor. — Dec. 20, 1977, No. 4, p. 611, §5.006, eff. Dec. 20, 1977.

§3207. Persons entitled to vote at by-election

All electors entitled to vote within the geographic district in which the by-election is to be held, pursuant to the call issued by the Governor to such effect, shall vote in a by-election. — Dec. 20, 1977, No. 4, p. 611, §5.007, eff. Dec. 20, 1977.

APPENDIX D

I. States Requiring Legislative Vacancies to be Filled by Appointment

Alaska	—	Alaska Stat. §15.40.320, *et seq.* (unless term will expire or general election held *before next session convenes)*
Colorado	—	Colo. Rev. Stat. §1-11-03
District of Columbia	—	D.C. Code §1-141(d)(2)
Hawaii	—	Haw. Rev. Stat. §§17-3, 17-4
Idaho	—	Idaho Code §59-904A
Illinois	—	Ill. Rev. Stat., Ch. 46, §25-6
Indiana	—	Ind. Code Ann. §2-2.1-2-1, 2-2.1-2-2, 2-2.1-2-4
Kansas	—	Kan. Stat. §25-312
Maryland	—	Md. Const., Art. III, §13
Montana	—	Mont. Rev. Codes Ann. §§5-2-401, *et seq.*
Nebraska	—	Neb. Rev. Stat. §32-1042(3)
Nevada	—	Nev. Const. Art. 4, §12 (unless "biennial election or any regular election" will be held *before the legislature next convenes*)
New Mexico	—	N.M. Stat. Ann. §§2-7-9(B), 2-8-9(B)
North Carolina	—	N.C. Gen. Stat. §163-11
Ohio	—	Ohio Const. Art. II, §11
Oregon	—	Ore. Rev. Stat. §§171.050, 171.060 (unless general election will be held within 90 days *and no special session of the legislature will be convened before such general election*)
South Dakota	—	S.D. Const. Art. III, §10
Tennessee	—	Tenn. Code Ann. §2-14-203
Utah	—	Utah Code Ann. (1981 Supp.) §20-1-5

Vermont	—	Vt. Stat. Ann., Tit. 17, §2623
Washington	—	Wash. Const., Amendment 52, Art. II, §15
West Virginia	—	W. Va. Code §3-10-5
Wyoming	—	Wyo. Stat. §22-18-111(a)(ii), (iii)

II. States Providing Either that Appointee shall be Selected by Predecessor's Political Party or that he must be Member of Same Party

Alaska	—	Alaska Stat. §15.40.330
Colorado	—	Colo. Rev. Stat. §1-11-103(1)
District of Columbia	—	D.C. Code §1-141(d)(2)
Hawaii	—	Haw. Rev. Stat. §§17-3, 17-4
Idaho	—	Idaho Code §59-904A
Illinois	—	Ill. Rev. Stat. Ch. 46, §25-6(a), (b), (e)
Indiana	—	Ind. Code Ann. §2-2.1-2-1
Maryland	—	Md. Const., Art. III, §13(a)
Montana	—	Mont. Rev. Codes Ann. §5-2-403
Nevada	—	Nev. Const. Art. 4, §12
North Carolina	—	N.C. Gen. Stat. §163-11
Ohio	—	Ohio Const. Art. II, §11
Oregon	—	Ore. Rev. Stat. §171.050(1)(a)
Utah	—	Utah Code Ann. §20-1-5
Washington	—	Wash. Const., Amendment 52, Art. II, §15
West Virginia	—	W. Va. Code §3-10-5
Wyoming	—	Wyo. Stat. §22-18-111(a)(ii)

Supplemental Appellee's Brief

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CLERK

No. 81-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JESUS RIVERA RODRIGUEZ, *et al.*,

Appellants,

v.

POPULAR DEMOCRATIC PARTY, *et al.*,

Appellees.

On Appeal From the Supreme Court of Puerto Rico

SUPPLEMENTAL BRIEF FOR APPELLEES

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February 8, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-328

JESUS RIVERA RODRIGUEZ, *et al.*,

Appellants,

v.

POPULAR DEMOCRATIC PARTY, *et al.*,

Appellees.

On Appeal From the Supreme Court of Puerto Rico

SUPPLEMENTAL BRIEF FOR APPELLEES

Pursuant to Rule 35.5, this Supplemental Brief is filed to present to the Court and judgment and opinion of the United States Court of Appeals for the First Circuit in *Cintron Garcia, et al.* v. *Romero Barcelo, et al. and the Popular Democratic Party, et al.* The judgment was entered and the opinion filed on January 27, 1982. Appellees' main brief was filed in this Court on January 4, 1982. Copy of the opinion is printed as Appendix to this Supplemental Brief.

In footnote 39, p. 30, of Appellees' main brief, we referred to the pendency of the *Cintron Garcia* case in the Federal District Court in Puerto Rico. Thereafter, United States District Judge Consuelo Cerezo "preliminarily enjoined Commonwealth officials from filling a between-elections vacancy in the Commonwealth's House of Representatives" with a successor chosen by the political party of the representative whose seat fell vacant. (Appendix A).

The Court of Appeals (Coffin, Chief Judge; Campbell and Breyer, Circuit Judges) reversed, vacating the preliminary injunction and remanding the cause. The Court's Per Curiam opinion includes a detailed analysis of plaintiffs' claims that the Commonwealth's provisions for filling vacancies until the next general election violate the First, Fifth and Fourteenth Amendments of the United States Constitution. The Court rejects plaintiffs' claims, holding that "it is defendants, not plaintiffs, who have shown a likelihood of success on the merits."

The constitutional issues presented by plaintiffs and decided by the First Circuit are precisely the same as in the present appeal before this Court. The factual differences are solely that *Cintron Garcia* relates to a Representative-at-Large, and the applicable provisions for filling the vacancy, while identical in substance to that in the present appeal, are set forth in the Commonwealth Constitution, whereas the case before this Court relates to a District Representative and the method for filling the vacancy is set forth in a Commonwealth statute enacted pursuant to specific Constitutional authority.

The First Circuit held that the federal Constitution, applicable authorities, practical factors, and considerations of the limitations of "judicial capacity" to decide when an interim appointment is "too long," support "allowing the states themselves to decide whether, and when, to fill interim vacancies by appointment or by by-elections"; that "there is no reason for denying Puerto Rico at least as much discretion or power" as the states; that a state's prescription for selection of the interim successor by the political party of the representative whose seat is vacated, is "consistent with the basic democratic role of the modern political party"; and that "the considerations favoring the constitutionality of party selection to fill an interim legislative vacancy are particularly strong" in the case of Puerto Rico

because they implement the provisions for minority representation. (Appendix A).

Respectfully submitted,

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February 8, 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1914

ANGEL MANUEL CINTRON GARCIA, *et al.*,
Plaintiffs, Appellees,

v.

CARLOS ROMERO BARCELO, ETC., *et al.*,
Defendants, Appellees.

PARTIDO POPULAR DEMOCRATICO, *et al.*,
Defendants, Appellants.

JUDGMENT

Entered January 27, 1982

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court is vacated and the cause is remanded for further proceedings consistent with the opinion filed this day.

The mandate of this court will issue at the close of business, Tuesday, February 2, 1982.

By the Court:

/s/ _____
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1914

ANGEL MANUEL CINTRON GARCIA, *et al.*,
Plaintiffs, Appellees,

v.

CARLOS ROMERO BARCELO, ETC., *et al.*,
Defendants, Appellees.

PARTIDO POPULAR DEMOCRATICO, *et al.*,
Defendants, Appellants.

Appeal From The United States District Court
For The District Of Puerto Rico

[Hon. Carman Consuelo Cerezo, *U.S. District Judge***]**

Before Coffin, *Chief Judge,*
Campbell and Breyer, *Circuit Judges.*

Lino J. Saldana, with whom H. Febus Bernardini, Marcos Ramirez, and Marcos Ramirez Lavandero was on memorandum for appellants.

Eduardo L. Buso for appellee, Hector Reichard d Cardona, Secretary of Justice.

Marvin S. Cohen, with whom John N. Gibbons and Stroock, Stroock & Lavan were on memorandum for plaintiffs, appellees.

January 27, 1982

PER CURIAM. On December 14, 1981, a federal district court in Puerto Rico preliminarily enjoined Commonwealth officials from filling a between-elections vacancy in the Commonwealth's House of Representatives according to the procedure set forth in the Constitution of the Commonwealth of Puerto Rico. The district judge believed that the constitutionally-mandated procedure, which allows the political party of the representatives whose seat fell vacant to choose his successor, probably violated the federal constitution. Defendants, the Popular Democratic Party ("PDP") and Hector L. Acevedo, its election commissioner, appeal. We believe that the issuance of a preliminary injunction was erroneous, and we vacate the injunction.

I

The Constitution of Puerto Rico provides that its House of Representatives shall be comprised of 51 members, 40 of whom shall be selected by election from single-member districts and 11 of whom shall be selected at large. The at-large representatives are the 11 persons obtaining the most votes in a Commonwealth-wide election — one in which each voter can vote for only 1 representative. Article III, Section 2 and Section 3. *See Garcia Passalacqua* v. *Tribunal Electoral*, 105 D.P.R. 49 (1976). Should an at-large seat fall vacant in between the quadrenniel elections, the President of the House is to appoint a successor "upon recommendation of the political party to which belonged the . . . representative causing the vacancy, with a candidate selected in the same manner as that in which his predecessor was selected." *Constitution of Puerto Rico*, Article III, Section 8.

In the general election held on November 4, 1980, Fernando J. Tonos Florenzan, a member of the PDP, was elected an at-large representative. Subsequently, he was disqualified because he was 23 years old — 2 years younger than the minimum age the Constitution prescribes. Article III, Section 5. His seat was declared vacant. *Tonos Florenzan* v. *Bernazard*, 81 JTS 78 (1981).

On December 10, 1981, before his successor could be selected, 8 registered voters — plaintiffs here — filed suit alleging that the replacement procedure violates the First, Fifth and Fourteenth Amendments to the United States Constitution because it does not

provide for a by-election open to all voters regardless of party. They sought a declaratory judgment, an order compelling a by-election and, subsequently a temporary restraining order (TRO).

The district court, while denying the TRO, quickly held a hearing and, on December 14, 1981, it issued a preliminary injunction effectively holding the seat vacant until it could decide the constitutional issue. Defendants appealed. Subsequently, on January 5, 1982, it denied a request to stay the injunction pending appeal. Defendants, noting that the House is divided evenly between the two major parties (25-25) and arguing that the House could not function properly, sought a stay from this court pending decision on their appeal. The issues were briefed effectively by all parties on an expedited schedule, and oral argument was heard on January 22, 1982. As the parties agree, the question of whether we should stay the injunction pending appeal raises the same issues as the appeal itself. Hence, we here decide the appeal — the validity of the preliminary injunction.

II

In determining whether a plaintiff is entitled to a preliminary injunction, the court normally considers four criteria, namely, "(1) that plaintiff will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) that plaintiff has exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction." *Planned Parenthood League of Massachusetts* v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981) (*quoting Women's Community Health Center, Inc.* v. *Cohen*, 477 F.Supp. 542, 544 (D.Me. 1979)). While the application of these criteria to the facts of a particular case ordinarily lies within the sound discretion of the trial courts, *Grimard* v. *Carlston*, 567 F.2d 1171, 1173 (1st Cir. 1978), we will reverse a trial court when it has applied an improper standard, or where it has misapplied the law to particular facts. *Amalgamated Transit Union* v. *Commonwealth of Massachusetts*, No. 80-1180, slip op. at 53 (1st Cir. Sept. 30, 1981); *Planned Parenthood League of Massachusetts* v. *Bellotti*, *supra*. That is to say, we will reverse where the record plainly reveals that the underlying facts as reasonably found by the

court, viewed in light of the proper standard, could not support the injunction's issuance. Such is the case here.

A

As the criteria listed above indicate, in deciding whether a preliminary injunction is appropriate, a district judge must engage in a balancing of harms. A preliminary injunction cannot issue unless the harm to plaintiff in its absence *outweighs* the harm to defendant that it may cause. The district court wrote that the requisite harm is to be found in the fact that allowing the PDP-selected replacement to take his seat pending resolution of this legal controversy would "moot" the case. It is wrong on this point. This controversy would remain real despite the seating of a replacement — at least until the election of a new representative at the next general election in 1984. Litigation could continue in this case just as it has in the related case of *Partido Popular Democratico* v. *Romero Barcelo*, 81 JTS 41 (1981), where the Supreme Court of the United States has allowed the replacement representative for District 31 to be seated while it passes on the Constitutional validity of the process through which he was chosen. [1] Should plaintiffs eventually prevail, in either case, presumably the seats at issue will be declared vacant just as was the seat of Tonos Florenzan.

[1] In *Partido Popular Democratico* v. *Romero Barcelo*, 81 JTS 41 (1981), the Supreme Court of Puerto Rico faced a statutory question involving a problem similar to the one we face today. There, a vacancy was created in the House of Representatives by the death of a district (not an at-large) representative. Interpreting the *statutory* provision establishing the procedure for the filling of vacancies in district seats, the Supreme Court held that no by-election was required for filling the vacancy. Addressing a federal right-to-vote question, the Supreme Court of Puerto Rico noticed that "The Constitution of the United States does not require either a fixed method for filling vacancies." Addressing an attack on equal protection grounds, the Court ruled:

> . . . the method designed by the lawmaker has no defects with regard to the equal protection of the law. The exclusion of candidates of other parties and of independent candidates does not violate the constitutional guarantee to the equal protection of the law. Even assuming that the strict scrutiny rule is applicable, there is compelling public interest directing the lawmaker to consider that the vacant seat belongs to the

The district court also found irreparable harm in the fact that, if plaintiffs later win, the voters would have been subject to laws enacted with the help of an unconstitutionally-selected legislator. This harm would seem at least equally balanced, however, by the interim harm that an injunction would have caused defendants if they later win, for in that case, those who voted for Tonos Florenzan in light of his party affiliation would wrongly have had *no* representative, see pp. 14-15 and n.5 *infra*. The PDP would have been deprived of what otherwise appears to be a one-vote majority leaving the House deadlocked with the Governor a member of the major rival party. Indeed, viewed from the point of view of the political parties, the harm to one caused by an injunction "wrongly" (as the case turns out) withheld would seem exactly balanced by the harm to the other caused by an injunction "wrongly" issued. And, the harm to some voters through the possible enactment of laws with the participation of a "wrongly" appointed legislator would seem at the least counterbalanced by the harm to others caused by failure to pass laws (or the passage of other laws) brought about by "wrongly" keeping a seat vacant during the January-April legislative session.

We are aware of no special factors tilting the balance in favor of plaintiffs. To the contrary, the facts that for many years legislators have been chosen in accordance with the challenged constitutional provisions, and that the Supreme Court of the United States has allowed another legislator facing a similar constitutional challenge to sit while that challenge is resolved, (see note 1 *supra*), suggests that there is no emergency requiring an immediate injunction. Plaintiffs'

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party who nominated the legislator. Among those compelling interests the following can be singled out: that there be no changes in the legislative balance until the next general election is held, the stability of governmental structures, the protection of the electoral mandate of the previous general election, and the reduction of inter-partisan political campaigns to once every four years.

The Supreme Court of the United States *sub nom Rodriguez* v. *Popular Democratic Party*, noted probable jurisdiction of an appeal from the judgment of the Puerto Rico courts, 50 U.S.L.W. 3300 (Oct. 20, 1981). However, the full Court decided not to stay the mandate of the Commonwealth Supreme Court pending its hearing, 49 U.S.L.W. 3968 (June 30, 1981).

ingenious argument that the injunction simply preserves the status quo overlooks the fact "status quo" in this context should encompass the normal functioning of the legislature and electoral processes in accordance with the provisions of the Constitution of Puerto Rico. Be that as it may, the district court finding that the harm to plaintiffs *outweighs* that likely imposed upon those whom the injunction affects adversely is clearly erroneous.

B

We shall go next to plaintiffs' claim that they are so clearly right on the merits as to warrant injunctive relief even if the harms are no better than evenly balanced. *Cf. Delaware River Port Authority* v. *Transamerican Trailer Transport, Inc.*, 561 F.2d 917, 924 (3d Cir. 1974). We reject this claim, for we believe that it is defendants, not plaintiffs, who have shown a likelihood of success on the merits. [2]

Plaintiffs' claim that Article III, Section 8 is unconstitutional rests upon two arguments. First, they argue that it violates the First, Fifth and Fourteenth Amendments to the Constitution for a state (or for the Commonwealth) to fill a legislative vacancy by appointment rather than through a by-election — at least where the next general election may be as much as three or four years away. In support, they cite reapportionment cases such as *Reynolds* v. *Sims*, 377 U.S. 533, 554 (1964), stressing the constitutionally protected "right of all qualified citizens to vote in state as well as in federal elections;" they also refer to British and American by-election practice at the time the Constitution was written and to other authority suggesting that the right to vote in elections for state legislators is protected by the federal constitution. But *cf. Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162, 176, 178 (1875); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 35 n.78 (1973). Second, they argue that in any event neither a state nor the Commonwealth constitution can require the appointment

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[2] The district judge, when referring to the likelihood of success in this case, used the phrase, "substantial possibility" of success. Except in the unusual case, however, where the harm to plaintiffs is particularly severe and disproportionate, *see Providence Journal Co.* v. *Federal Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979), in this circuit a probability of success is ordinarily called for.

of a person selected by one political party. To do so, they assert, would unconstitutionally discriminate against members of the other political parties, for it may well allow them no voice whatsoever in the selection of the person who will represent them in the legislature. In support of this proposition, they cite *Williams* v. *Rhodes*, 393 U.S. 23 (1968), *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), and other authority that holds or suggests that statutes denying the franchise to certain citizens will be closely scrutinized and probably struck down when access to the ballot is limited because of political belief or party affiliation.

We are not convinced by these lines of argument for three sets of reasons. First, as plaintiffs admit, none of these authorities directly considers whether it is constitutional to appoint a successor to fill an interim legislative vacancy. According to the undisputed assertion of the defendants, at least 21 states allow legislative vacancies to be filled by the appointment of a successor who will serve until the next general election or the end of the predecessor's term. Of these, at least 12 require that the appointee be a member of the same political party as his predecessor; and four others allow the political party itself to make the selection. When this type of provision has been challenged, the courts, with one exception, have upheld its validity. *See, e.g., Patterson* v. *Burns*, 327 F. Supp. 745, 749, 755 (D.Ha. 1971)(three judge court)(vacancy in the Hawaii senate; "Plaintiff urges that his district would effectively be malapportioned were the governor permitted to appoint a senator to fill the vacancy. . . . [T]he court finds this argument to be without merit. . . ."); *Kaelin* v. *Warden*, 334 F. Supp. 602, 606-08 (E.D. Pa. 1971)(three judge court)(fillings of vacancies by appointment of a candidate belonging to the party of his predecessor sustained); *Wilson* v. *Oklahoma City Council*, 347 F. Supp. 306, 308 (W.D. Okla. 1972)("no authority has been . . . found which declares unconstitutional any state law which directs the filling of a vacancy in public office by appointment rather than by an immediate election"). [3]

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[3] In the single exception, *Rudman* v. *Rini*, 64 Ill. 2d 321, 356 N.E. 2d 4 (1976), the Illinois Supreme Court held that to allow a political party to fill a nonlegislative county office violated the *state* constitution's separation of powers provision — a matter here only tangentially, if at all, relevant.

These courts have reasoned that (1) the long history of filling vacancies by appointment, (2) the need to preserve the political balance obtained in previous general elections, (3) the expense and related inconvenience of calling special elections, (4) the uncertainty about the extent to which, or when, by-elections (with their typically lower turnout, dependency upon timing and different political strategies) are fairer alternatives than waiting until the next general election, (5) the need to assure a single party time to carry out a program, and other similar factors, indicate the wisdom of allowing the states themselves to decide whether, and when, to fill interim vacancies by appointment or by by-election. There is no reason for denying Puerto Rico at least as much discretion or power. That the federal Constitution embodies this wisdom is suggested by the broad language used in relation to the form of a state's government ("the United States shall guarantee to every State . . . a Republican Form of Government," Article IV, Section 4); by the Tenth Amendment's reservation to the states of powers not prohibited by the Constitution, and by the *absence* in the Constitution of any language requiring the contrary. Indeed, it was believed necessary to insert *specific* language into the Constitution providing for by-elections in the case of federal senators.[4] There is no such language applicable to state legislatures. (Moreover, even as to the "federal official" language which specifically requires a by-election, the federal courts have upheld the validity of interim appointments with twenty-nine months duration. *Valenti* v. *Rockefeller*, 292 F. Supp. 851 (S.D.N.Y.)(three judge court), *aff'd per curiam*, 393 U.S. 405 (1969).

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[4] When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

XVII Amendment.

As to members of the House of Representatives, Article I, Section 2 of the U.S. Constitution provides, "When Vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."

Thus, considerations of "statutory" interpretation (the absence of any by-election language addressed to the states), practical considerations (cost along with possibly low turnout at by-elections for state legislature), considerations of judicial capacity (the highly subjective nature of determining when an interim appointment is "too long," given an appointment that is, in any event, bounded by the next general election), and considerations of federalism (state autonomy in determining, within fairly broad limits, the nature of its own political system) all make it likely that these decisions allowing interim appointments to fill state legislative vacancies remain good law.

Second, once it is assumed that an interim appointment process is constitutional, the cases assuring broad participation in the electoral process, such as *Kramer* v. *Union School District, supra* and *Williams* v. *Rhodes, supra,* become far less relevant, for they concern participation in elections that are admittedly in principle open to all. Similarly, the cases holding that party allegiance is an impermissible criterion for appointment to state office are of little help. *See, e.g., Branti* v. *Finkel,* 445 U.S. 507 (1980); *Elrod* v. *Burns,* 427 U.S. 347 (1976). Here we deal with *legislative* office — an office which is highly political in nature and thus central to the function that a political party serves in a democracy. Rather, the issue here is whether selection by the party that won at the preceding election is somehow less consistent with the letter, or with the spirit, of the Constitution than appointment by a governor.

One might argue, as a matter of form, that appointment by a governor is indeed more "democratic" because the governor is himself elected. Yet in practice this is likely not to be so when the governor and former representative are of different parties. In that case the party difference is likely to produce successors of different parties. In such circumstances, we see how the framers of a state constitution might conclude that party selection is more likely to reflect the will of the voters than selection by the governor, for it was the former representative's party, not that of the governor, that won the prior seat. Such a judgment, reflecting a knowledge of political practice, seems perfectly consistent with the basic democratic role of

the modern political party — translating the individual wills of myriad voters into a practically achievable program administered by a government that can be held responsible for its performance at the polls. *See Schattschneider, Party Government* 1 (1942); *Finer, The Theory and Practice of Modern Government,* 627 (1960). Although this type of vacancy selection might be unusual, found in only four states and Puerto Rico, it seems no less fair or democratic in principle than the party primary itself — an essential part of our democratic political system. *See, e.g., Cousins* v. *Wigoda,* 419 U.S. 477 (1975)(limiting the power of the states to enact laws inconsistent with political party's rules).

Third, the considerations favoring the constitutionality of party selection to fill an interim legislative vacancy are particularly strong here. Article III, Section 8 of the Constitution of Puerto Rico is part of a broader constitutional scheme designed to increase the likelihood of minority representation in the legislature. *See* Article III, Section 7. Section 8 provides that each voter in the election for eleven at-large representatives is to have only *one* vote. Presumably, the two major parties would exhaust most of their voting strength in electing the first 8, 9 or 10 representatives leaving a minority party with the most votes for the 11th position. Article III, Section 8 complements this provision by stating that in case of vacancy, the party whose candidate won shall select the replacement.

A by-election requirement is inconsistent with the basic purpose of these two articles. A by-election for a minority party vacancy, for example, would almost certainly be won by a major party, for at a by-election (with one position at stake), unlike a general election (with eleven positions at stake), the major party's votes would not be split.

Plaintiffs argue that these provisions have recently achieved actual minority representation only once, in 1972. Regardless, they are reasonable in theory and continue to make minority representation easier to achieve. Similar "limited voting" provisions have been consistently sustained. *Hechinger* v. *Martin,* 411 F. Supp. 650 (D.D.C.)(three judge court)(limited voting scheme for the District of Columbia Council sustained),(*aff'd per curiam* 429 U.S. 1030

(1977)); *LoFrisco* v. *Schaffer*, 341 F. Supp. 743 (D.Conn. 1972)(three judge court)(limited voting scheme for the State of Connecticut sustained), *aff'd*, 409 U.S. 972 (1972); *Blaikie* v. *Power*, 13 N.Y. 2d 134, 193 N.E. 2d 55 (limited voting for New York City Council sustained), *appeal dismissed*, 375 U.S. 429 (1964); *People* v. *Carpentier*, 30 Ill. 2d 590, 198 N.E.2d 514 (1964). Apparently, the two major parties, to take maximum advantage of their strength, do not run slates of 11 candidates, but, rather, slates of 6 candidates each. Moreover, because a voter who votes for the party, rather than the individual, automatically votes for the person at the *top* of the party list, the party varies the order of candidates on the list from district to district. For example, a party commanding the allegiance of about half the voters, would so make up its list of six that a different person was at the head of the list in districts that each account for about one-sixth of the party's voting strength. This strategy means that a small minority party — free to aggregate its votes across the Commonwealth as a whole — must obtain about eight percent of the vote to elect a representative. The leading minority party (Puerto Rico Independence Party) was not able to obtain more than about five percent of the vote in the last election. Yet, its goal of achieving representation is obviously easier to achieve in the presence of these provisions than in their absence.

Moreover, given the existence of this voting system, it is understandable why the framers of Article III, Section 8 thought that filling a vacancy by party selection would be fairer than requiring a by-election. For one thing, the voting returns show that individual candidates receive enormous number of votes in a few districts and nearly none in others — a fact suggesting that *most voters vote for the party* — giving the candidate vast numbers of votes when he is at the head of the list (and "party" votes count in his favor) and hardly any votes when he is not (and voters must vote separately for him by name).[5] For another thing, how is a by-election to be structured? If it

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[5] Mr. Tonos Florenzan received 120,678 votes in the 1980 election and 120,268 of these votes were cast for him in the 21 precincts where he appeared at the top of the PDP ticket. Although he was available to the electors in the rest of the 113 electoral precincts of Puerto Rico, he accumulated only around 400 votes in those other precincts.

is Commonwealth-wide, many voters (those outside the districts where Tonos Florenzan appeared at the top of the list) will effectively have been given two votes for representative at-large, for the single person they voted for at the general election will also be sitting. Yet, one cannot readily limit the voting to individual Tonos Florenzan districts, for to do so would deprive those few persons outside of those districts who nonetheless voted for him, of a vote for his replacement. To declare a by-election for all 11 seats is obviously unreasonable, for 10 are not vacant. All this helps to explain why the party selection method for filling *interim* vacancies appears reasonable.

In sum, this vacancy-filling system appears to be no less fair or democratic than that found in most states; it is nonetheless tailored to the special concerns and political circumstances of the Commonwealth of Puerto Rico. Certainly, the federal Constitution and the Compact entered into by the Congress with Puerto Rico provide no less autonomy to Puerto Rico than to the states in this regard. *See Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41 (1970); *Cordova & Simonpietri Insurance Agency, Inc.* v. *Chase Manhattan Bank, N.A.*, 649 F.2d 36 (1st Cir. 1981). While we recognize that plaintiffs have raised a serious argument — an argument weighty enough to lead the Supreme Court to note probable jurisdiction in a related case, *see* note 1 *supra*, — at this stage, we believe, for the reasons set out, that defendants, not plaintiffs, are likely to prevail on the merits. [6]

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[6] Plaintiffs also argue that the selection process violates the Twenty-Sixth Amendment to the Constitution. Article 3, Section 8 specifies that the party select its replacement in the same manner in which the former representative was selected. In this case, the former representative was chosen as a "youth delegate" and the successor-selection process, in plaintiffs' view, therefore discriminates against the aged. This issue was not raised below, and it played no part in the district judge's deliberations. Indeed, the issue apparently was first raised in a brief filed here the day before argument. Defendants have had no opportunity to consider this lately added ground. Therefore we do not pass upon this question. We note, however, that we do not believe plaintiffs' argument is likely to prove so clearly correct as to warrant issuance of a preliminary injunction. Plaintiffs point to *Terry* v. *Adams*, 345 U.S. 461 (1953) in which the Supreme Court struck down a party primary that involved racial discrimination. Selection of a "youth

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The final factor, "adverse affect upon the public interest," need not be considered at length. We will, however, note two points. First, in most of the cases in which the courts have examined election practices — including those in which it held the practice unconstitutional — they not only refrained from authorizing preliminary injunctions but they have also carefully tailored any final, injunctive relief to avoid interfering with the work of sitting legislatures, despite the presence of legislators whose selection was unconstitutional under the case then decided. This was true in reapportionment cases — *see Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978) — and others as well — *see Ortiz* v. *Hernandez Colon*, 385 F. Supp. 111 (D.P.R. 1974)(three judge court)(*see* 511 F.2d 1080 (1st Cir. 1975) and 429 U.S. 1031 (1977)). This approach suggests a belief that the public, as a general rule, is likely to suffer less adverse an impact from the presence of an "unconstitutionally selected" legislator than it is from direct judicial intervention into the affairs of an ongoing legislature. Second, the Supreme Court has reached a similar judgment in a case directly related to this one. It has refused to stay, *sub nom Rodriguez* v. *Popular Democratic Party*, the mandate of the Supreme Court of Puerto Rico in *Partido Popular Democratico* v. *Romero Barcelo*, *supra*, holding that a similar appointing system for district representation is constitutional. At the same time it has decided to hear whether the laws providing for the filling of such *district* (not at-large) vacancies are constitutional. Thus it will be passing upon the constitutionality of provisions similar in some respects to Article III, Section 8 itself. It has specified that while it decides that issue, the representatives chosen to fill the vacancy will sit. [7] In other words, the

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delegate" does not obviously fit within that case's bounds. Given the issue and the far-reaching impact of a decision (presumably applying to party primary election procedures as well) full argument is warranted prior to any judicial change in the status quo.

[7] Justice Brennan referred the issue to the whole Court. 49 U.S.L.W. 3968 (1981).

Supreme Court has reached a similar judgment in a case virtually identical to this one. [8]

To put the matter differently, we believe the district court should have given somewhat more weight than it did to the desirability of the legislature's functioning and the undesirability except in compelling circumstances of a federal court's intruding through injunctions directly into the Commonwealth's legislative and political processes. *Cf. Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975); *Adams* v. *Vance*, 570 F.2d 950 (D.C. Cir. 1978). The "preliminary injunction" criteria that we have listed are guidelines, not mechanical formula, and they are no substitute for the careful exercise of a judgment sensitive to all of the interests likely to be affected by an injunction and the suitability of the underlying controversy to judicial resolution. Here there were adequate signs that might have warned a federal judge to approach the request for injunctive relief with caution: The provisions attacked are part of the Constitution of Puerto Rico. The Supreme Court of Puerto Rico, as we have said, had addressed a similar challenge to a similar provision and had upheld its constitutionality. *Partido Popular Democratico* v. *Romero Barcelo*, 81 JTS 41 (1981). The "injury" at issue is to the body politic as a whole; there is no claim of discrimination or real injury to a handful of otherwise unprotected individuals. The "injury" has occurred for many years without previously giving rise to law suits or complaints. The injunction sought interferes directly with the ongoing work of the legislature. The Supreme Court of the United States, in a directly-related case, had refused a stay which would have the same effect as the injunction sought here.

Even without these special factors, however, even under the most traditional tests, the preliminary injunction ought not to have issued. *We therefore vacate the order of the district court and remand for proceedings consistent with this opinion.*

The mandate of this court will issue at the close of business, Tuesday, February 2, 1982.

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[8] Thus, the injunction at issue here cannot prevent at least one "potentially unconstitutional" representative from sitting — an additional fact that makes the district court's finding of "irreparable harm" in the absence of the injunction surprising.

VOTE FOR CANDIDATES FOR REPRESENTATIVES AT LARGE
POPULAR DEMOCRATIC PARTY
GENERAL ELECTIONS 1980

PRECINCTS		RONY JARABO	LUIS MUNOZ ARJONA	SEVERO E. COLBERG	LUIS A. DUPREY	FERNANDO TONOS	JOSE E. ARRARAS
San Juan	1	86	24	43	16	7	8,390
San Juan	2	31	8,650	39	8	6	51
San Juan	3	10,873	25	44	10	6	43
San Juan	4	28	9	27	20	12,807	70
San Juan	5	37	11,190	36	10	14	50
Guaynabo	6	50	11	38	4,277	6	43
Guaynabo	9	2	2	3	1,665	0	1
Bayamon	7	27	8	33	7,490	9	31
Bayamon	8	36	22	67	16,597	13	50
Bayamon	10	23	5	24	3	5	8,124
Bayamon	16	28	7,326	49	7	9	25
Corozal	11	10	7	16	0	7,201	15
Naranjito	12	13	5	5	1	7,686	9
Toa Alta	13	17	6,451	12	4	3	13
Toa Baja	14	20	21	24	5,545	4	26
Toa Baja	18	32	12	47	8,246	11	27

VOTE FOR CANDIDATES FOR REPRESENTATIVES AT LARGE
POPULAR DEMOCRATIC PARTY
GENERAL ELECTIONS 1980 — (CONTINUED)

PRECINCTS		RONY JARABO	LUIS MUNOZ ARJONA	SEVERO E. COLBERG	LUIS A. DUPREY	FERNANDO TONOS	JOSE E. ARRARAS
Dorado	15	2,507	2	5	0	1	7
Dorado	19	4,139	5	20	0	1	10
Catano	17	11	6	14	1	0	4,409
Vega Alta	20	6,822	7	15	4	3	4
Vega Baja	21	24	10,977	37	7	4	22
Manati	22	6	1	5	1	2	2,811
Manati	27	14	3	5	0	0	5,627
Morovis	23	6,039	2	5	2	1	5
Orocovis	24	8	0	4,927	0	6	3
Ciales	25	7	1	0	0	1	4,095
Jayuya	26	3,437	0	1	0	1	4
Barceloneta	28	7	1	5	0	4,880	8
Florida	29	1	1,787	2	0	0	4
Arecibo	30	22	5	8,186	1	2	17
Arecibo	31	31	11	12,764	3	5	25
Hatillo	32	7,382	0	4	0	1	4

VOTE FOR CANDIDATES FOR REPRESENTATIVES AT LARGE
POPULAR DEMOCRATIC PARTY
GENERAL ELECTIONS 1980 — (CONTINUED)

PRECINCTS		RONY JARABO	LUIS MUNOZ ARJONA	SEVERO E. COLBERG	LUIS A. DUPREY	FERNANDO TONOS	JOSE E. ARRARAS
Hatillo	33	584	0	1	0	0	1
Camuy	34	6	3	9	0	1	6,659
Quebradillas	35	8	5	10	4,961	2	9
Isabela	36	9,547	7	10	6	1	11
Aguadilla	37	12,009	12	25	4	4	25
Moca	38	10	4	14	1	0	5,055
Moca	39	0	0	2	0	0	1,766
Aguada	40	6,647	7	14	0	0	7
Rincon	41	11	1	4	1	3,595	7
Anasco	42	6,114	2	8	0	0	6
Mayaguez	43	6	3	8	0	2	3,120
Mayaguez	44	52	16	73	7	4	16,067
Mayaguez	45	9	5	15	1	0	4,149
San Sebastian	46	21	7	18	9,301	0	10
Las Marias	47	4	1	3	2,524	0	3
Maricao	48	1	1	3	1	0	1,740

VOTE FOR CANDIDATES FOR REPRESENTATIVES AT LARGE
POPULAR DEMOCRATIC PARTY
GENERAL ELECTIONS 1980 — (CONTINUED)

PRECINCTS		RONY JARABO	LUIS MUNOZ ARJONA	SEVERO E. COLBERG	LUIS A. DUPREY	FERNANDO TONOS	JOSE E. ARRARAS
Hormigueros	49	17	3	12	0	3,853	7
San German	50	3	1,140	6	0	0	0
San German	51	23	7,353	29	1	4	13
Cabo Rojo	52	12	6	8,324	0	4	9
Lajas	53	10	7	5,966	4	9	19
Sabana Grande	54	13	5	6,829	0	1	15
Guanica	55	20	0	8	1	2	4,498
Yauco	56	22	13	9,297	21	3	21
Guayanilla	57	0	0	1	382	0	1
SUBTOTALS		**76,919**	**55,177**	**57,191**	**61,134**	**40,179**	**77,241**

VOTE FOR CANDIDATES FOR REPRESENTATIVES AT LARGE
POPULAR DEMOCRATIC PARTY
GENERAL ELECTIONS 1980 — (CONTINUED)

PRECINCTS		RONY JARABO	LUIS MUNOZ ARJONA	SEVERO E. COLBERG	LUIS A. DUPREY	FERNANDO TONOS	JOSE E. ARRARAS
Guayanilla	62	20	5	17	4,534	2	11
Lares	58	9	8	6,808	2	4	5
Utuado	59	19	0	8,422	1	[illegible]	17
Adjuntas	60	5	2	0	0	2,008	3
Adjuntas	61	5	0	0	0	2,963	3
Penuelas	63	4	3	5	4,665	5	4
Ponce	64	27	9	22	19	7,724	19
Ponce	65	11,834	13	38	21	6	29
Ponce	66	33	18	12,190	14	7	30
Villalba	67	1	3	4,610	2	1	11
Juana Diaz	68	14	13	6	18	8,891	41
Santa Isabel	69	11	0	6	13	1	3,553
Santa Isabel	70	1	0	1	1	0	1,095
Coamo	71	16	8,152	10	1	4	8
Salinas	72	13	4	10	4	2	6,915
Aibonito	73	10	4	4,684	0	1	12

VOTE FOR CANDIDATES FOR REPRESENTATIVES AT LARGE
POPULAR DEMOCRATIC PARTY
GENERAL ELECTIONS 1980 — (CONTINUED)

PRECINCTS		RONY JARABO	LUIS MUNOZ ARJONA	SEVERO E. COLBERG	LUIS A. DUPREY	FERNANDO TONOS	JOSE E. ARRARAS
Aibonito	74	6	0	1,360	0	2	4
Barranquitas	75	12	1	11	0	5,606	8
Comerio	76	4,865	3	6	0	3	5
Aguas Buenas	77	5,279	5	6	1	2	6
Cidra	78	3	2,807	5	0	0	4
Cidra	79	3	3,837	10	1	1	10
Cayey	80	25	4	10,497	4	13	37
Guayama	81	7	1	5	2,455	1	11
Guayama	82	27	10	39	6,060	7	31
Maunabo	83	3,056	0	3	0	1	2
Patillas	84	22	2	4	33	4,669	8
Arroyo	85	9	3	14	3,935	2	11
Caguas	86	42	17,579	42	16	17	59
Caguas	87	16	8,284	18	14	14	20
Juncos	88	7	6,608	7	1	2	4
Gurabo	89	18	5	5	1	6,173	14

VOTE FOR CANDIDATES FOR REPRESENTATIVES AT LARGE
POPULAR DEMOCRATIC PARTY
GENERAL ELECTIONS 1980 — (CONTINUED)

PRECINCTS		RONY JARABO	LUIS MUNOZ ARJONA	SEVERO E. COLBERG	LUIS A. DUPREY	FERNANDO TONOS	JOSE E. ARRARAS
San Lorenzo	90	7,977	6	7	1	8	9
Yabucoa	91	27	3	14	1	8,442	13
Las Piedras	92	4	1	3	3	2,877	11
Las Piedras	95	3	3	1	1	2,994	8
Humacao	93	27	12,383	39	11	12	27
Naguabo	94	25	4	15	1	5	5,422
Ceiba	96	2	1	1	1	0	737
Ceiba	102	5	1,774	4	0	2	5
Rio Grande	97	22	6	12	4	7,229	35
Luquillo	98	8	1	5	1	3,454	12
Fajardo	99	15	8	14	1	6,680	32
Culebra	100	376	0	0	0	0	0
Vieques	101	5	2,217	4	1	0	5
Canovanas	103	13	7	14	2	7,704	22
Loiza	104	6	4	15	2,645	1	8
Carolina	105	35	10	56	10,760	14	50

VOTE FOR CANDIDATES FOR REPRESENTATIVES AT LARGE
POPULAR DEMOCRATIC PARTY
GENERAL ELECTIONS 1980 — (CONTINUED)

PRECINCTS		RONY JARABO	LUIS MUNOZ ARJONA	SEVERO E. COLBERG	LUIS A. DUPREY	FERNANDO TONOS	JOSE E. ARRARAS
Carolina	106	71	31	57	15	9	14,102
Carolina	107	7	3	5	0	2,832	19
Trujillo Alto	108	4,672	12	18	6	4	36
Trujillo Alto	110	4,356	7	8	3	6	24
San Juan	109	64	17	10,783	6	39	65
San Juan	111	55	26	53	10,299	27	92
San Juan	112	21	15	19	4	8	6,070
Guaynabo	113	43	14	63	9,065	17	41
SUBTOTALS		**43,258**	**63,936**	**60,071**	**54,647**	**80,499**	**38,835**
TOTALS		**120,177**	**119,113**	**117,262**	**115,781**	**120,678**	**116,076**

Appellant's Reply Brief

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No. 81-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JESUS RIVERA RODRIGUEZ, *et al.*,
Appellants

v.

POPULAR DEMOCRATIC PARTY, *et al.*,
Appellees

On Appeal from the Supreme Court of Puerto Rico

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TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		(ii)
I.	THE CONSTITUTIONAL PROTECTIONS ACCORDED THE VOTING RIGHTS OF U.S. CITIZENS APPLY WITH FULL FORCE TO THE VOTERS OF PUERTO RICO	2
II.	QUALIFIED VOTERS ARE CONSTITUTIONALLY ENTITLED TO ELECT THEIR LEGISLATIVE REPRESENTATIVE, WHETHER THE VACANCY TO BE FILLED ARISES UPON EXPIRATION OF A TERM OR DURING IT	4
III.	APPOINTMENTS TO FILL VACANCIES IN SINGLE-MEMBER DISTRICT SEATS VIOLATE THE CONSTITUTIONAL RIGHT OF THE QUALIFIED VOTERS OF THESE DISTRICTS TO PARTICIPATE EQUALLY IN THE POLITICAL PROCESS	11
IV.	THE POWER TO APPOINT LEGISLATORS MAY NOT CONSTITUTIONALLY BE VESTED IN A POLITICAL PARTY	13
V.	NO LEGITIMATE OR COMPELLING PURPOSE JUSTIFIES THE PUERTO RICO STATUTE	16
CONCLUSION		20
APPENDIX A		1a
APPENDIX B		4a

TABLE OF AUTHORITIES

CASES:	Page
Avery v. Midland County, 390 U.S. 474 (1968)	7
Ball v. James, 451 U.S. 355 (1981)	10
Balzac v. Porto Rico, 258 U.S. 298 (1922)	4
Bell v. Southwell, 376 F.2d 659 (5th Cir. 1967)	1
Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)	3,4
Califano v. Torres, 435 U.S. 1 (1978)	4
Cintron Garcia v. Romero Barcelo, No. 81-1914 (1st Cir. Jan. 27, 1982)	2,6
Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 50 U.S.L.W. 4071 (U.S. Dec. 14, 1981)	16,18
Community Communications Co., Inc. v. City of Boulder, 50 U.S.L.W. 4144 (U.S. Jan. 13, 1982)	10
Davis v. Mann, 379 U.S. 694 (1965), *affirming mem.*, 238 F.Supp. 458 (E.D. Va. 1964)	1-2
Dollinger v. Jefferson County Commissioners Court, 335 F. Supp. 340 (E.D. Tex. 1971)	1
Donohue v. Bd. of Elections of the State of New York, 435 F. Supp. 957 (E.D.N.Y. 1976)	1
Duncan v. Louisiana, 391 U.S. 145 (1968)	4
Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981), *cert. granted*, No. 81-1055 (February 22, 1982)	10
Dunn v. Blumstein, 405 U.S. 330 (1972)	17
Elrod v. Burns, 427 U.S. 347 (1976)	14
Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572 (1976)	3,4
Fortson v. Morris, 385 U.S. 231 (1966)	9,13,15
Gray v. Sanders, 372 U.S. 368 (1963)	10

	Page
Harris v. Rosario, 446 U.S. 651 (1980)	4
Hechinger v. Martin, 411 F. Supp. 650 (D.D.C. 1976), *aff'd mem.*, 429 U.S. 1030 (1977)	15
Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173 (1979)	12
Jackson v. Ogilvie, 426 F. 2d 1333 (7th Cir.), *cert. denied*, 400 U.S. 833 (1970)	5
Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969)	15
Kusper v. Pontikes, 414 U.S. 51 (1973)	12
Lucas v. Colorado General Assembly, 377 U.S. 713 (1964)	7
Marston v. Lewis, 410 U.S. 679 (1973)	11
Minor v. Happersett, 21 Wall. 162 (1875)	4,5,9
Patterson v. Burns, 327 F. Supp. 745 (D. Hawaii 1971)	5,10
Powell v. McCormack, 395 U.S. 486 (1969)	1,5
Reid v. Covert, 354 U.S. 1 (1957)	4
Reitman v. Mulkey, 387 U.S. 369 (1967)	7
Reynolds v. Sims, 377 U.S. 533 (1964)	5,7,8, 10
Rosario v. Rockefeller, 410 U.S. 752 (1973)	12
Rudman v. Rini, 64 Ill. 2d 321, 356 N.E.2d 4 (1976)	18
Sailors v. Kent Board of Education, 387 U.S. 105 (1967)	10,11,13, 15
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	4
Sherbert v. Verner, 374 U.S. 398 (1963)	14
Snowden v. Hughes, 321 U.S. 1 (1944)	12

	Page
Speiser v. Randall, 357 U.S. 513 (1958)	14
Torres v. Puerto Rico, 442 U.S. 465 (1979)	3,4
United Public Workers v. Mitchell, 330 U.S. 75 (1947)	14
Valenti v. Rockefeller, 292 F. Supp. 851 (S.D.N.Y. 1968), *aff'd per curiam*, 393 U.S. 405 (1969)	6,11
Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973)	10
UNITED STATES CONSTITUTION:	
Article I, § 2	8,10
Article II, § 1	10
Article IV, § 4	9
Amendment XII	10
Amendment XVII	15
Amendment XXV	10
PUERTO RICO CONSTITUTION:	
Article III, § 3	16
Article III, § 7	16
Article III, § 8	16
STATUTES AND TREATIES:	
28 U.S.C. § 2106	1
Organic Act of 1917, 39 Stat. 951, 48 U.S.C. §§ 731 *et seq.*	14
District of Columbia Charter, § 1-141	15
Electoral Law of Puerto Rico Article 5.006, 16 L.P.R.A. § 3206	17

Page

LEGISLATIVE MATERIALS:

Comm. on the Judiciary, *Direct Popular Election of the President and Vice President of the United States*, S. Rep. No. 96-111, 96th Cong., 1st Sess. (1979) 9,10

98 Cong. Rec. 6180 (1952) 3

98 Cong. Rec. 7848 (1952) 3

S. Rep. No. 1720, 82d Cong., 2nd Sess. (1952) 2,3

Md. House Bill No. 666 (1982) 7

BOOKS, ARTICLES AND MISCELLANEOUS:

Adams, *The First American Constitution* (1980) 9

Bibby, Mann, Ornstein, *Vital Statistics on Congress, 1980* (1980) 18

III *Debates on the Federal Constitution* (J. Elliot ed. 1907) 9

The Federalist, No. 10 (New American Library ed. 1961) 18

The Federalist, No. 39 9-10,15

The Federalist, No. 52 19

Memorandum By The Government Of The United States Of America Concerning The Cessation Of Transmission Of Information Under Article 73(e) Of The Charter With Regard To The Commonwealth Of Puerto Rico, 28 Dept. of State Bull. 584 (1953) 3

Note, *Puerto Rico: Colony or Commonwealth?*, 6 N.Y.U. J. Int'l L. & Pol. 115 (1973) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-328

JESUS RIVERA RODRIGUEZ, *et al.*,
Appellants

v.

POPULAR DEMOCRATIC PARTY, *et al.*,
Appellees

On Appeal from the Supreme Court of Puerto Rico

REPLY BRIEF FOR APPELLANTS

Appellants submit this reply brief to explain why the PDP's arguments fail to justify party-controlled appointments to vacancies in legislative seats from single-member districts.[1]

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[1] The PDP begins by suggesting (at 3 n.2) that this Court may not be in a position to grant appellants any relief because the Puerto Rico House of Representatives is the "sole judge" of the qualifications of its own members under Puerto Rico law. This Court, however, has the power to decide federal constitutional issues arising from claims to a legislative seat, even where a coordinate branch of the National Government is involved. *See Powell v. McCormack*, 395 U.S. 486, 512-49 (1969).

A federal court—including this Court, *see* 28 U.S.C. § 2106—may order a new election for a State legislative seat when the first election is found to have been conducted in an unconstitutional manner. *E.g., Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1967); *Donohue v. Bd. of Elections of the State of New York*, 435 F.Supp. 957, 967-68 (E.D.N.Y. 1976). This power includes the ability, in appropriate circumstances, to direct an incumbent to vacate his office before the end of his term in order to allow the seating of the victor in a new, untainted special election. *Dollinger v. Jefferson County Commissioners Court*, 335 F.Supp. 340 (E.D. Tex. 1971). *See also, e.g., Davis v. Mann*, 379

(footnote continued)

I. THE CONSTITUTIONAL PROTECTIONS ACCORDED THE VOTING RIGHTS OF U.S. CITIZENS APPLY WITH FULL FORCE TO THE VOTERS OF PUERTO RICO.

1. The PDP necessarily concedes (at 10) that the constitutional guarantees of the First and Fifth or Fourteenth Amendments that protect the voting rights of U.S. citizens protect the voting rights of American citizens in Puerto Rico. There is no basis for the PDP's assertion that these amendments "are not to be applied to Puerto Rico in precisely the same way, or to precisely the same degree" (at 13), as they are to the States. Even the court below, in upholding the Puerto Rico statute, did so only because it believed that the party-appointment scheme did not infringe the constitutional rights of the citizens of the States. *See* J.S. App. 13b-14b & n.5.

2. The PDP emphasizes Puerto Rico's autonomy over its local affairs, but overlooks Puerto Rico's overriding obligation to abide by basic federal constitutional principles. *See* Appellants' Br. at 12-13. When Congress insisted in 1952 that any amendments to the Puerto Rico Constitution conform with the United States Constitution, Congress explained that, as "American citizens living under the American flag and the American Constitution," the people of Puerto Rico "will exercise self-government" only within a "framework" of undiluted constitutional guarantees of individual rights. S. Rep. No. 1720, 82d Cong., 2d Sess. 6, 7 (1952).

(footnote continues)

U.S. 694 (1965), *affirming mem.* 238 F.Supp. 458 (E.D. Va. 1964). Thus, the First Circuit recently held, in the case about which the PDP itself has filed a supplemental brief, that the seating of another member of the Puerto Rico legislature did not moot a challenge to the constitutional "validity of the process through which he was chosen." *Cintron Garcia v. Romero Barcelo*, No. 81-1914 (1st Cir. Jan. 27, 1982), *reprinted in* Appellees' Supp. Br. at 6a.

Finally, the Court may assume that the PDP (at whose instance the incumbent was certified and seated), the Puerto Rico House of Representatives, and the Secretary of Justice (who may institute *quo warranto* proceedings, if necessary) would respect a decision by this Court to reverse the judgment below.

> "The rights, privileges, and immunities of citizens of the United States shall be respected in Puerto Rico *to the same extent as though Puerto Rico were a State*. . . .
>
> ". . . Applicable provisions of the United States Constitution . . . will have *the same effect* as the Constitution of the United States has with respect to State constitutions or State laws." *Id.* at 6 (emphasis added).

Puerto Rico's Resident Commissioner at the time agreed: "We will not be independent from the United States any more than a State is." 98 Cong. Rec. 6180 (1952) (remarks of Mr. Fernos Isern). *See also* 98 Cong. Rec. 7848 (1952) (remarks of Sen. Smathers).[2]

3. The decisions of this Court also refute the PDP's proposition. In *Torres v. Puerto Rico*, 442 U.S. 465 (1979), *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976), and *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the Court tested the constitutionality of Puerto Rico statutes under precisely the same standards that it applies to the acts of State governments. In all three cases the Court explicitly rejected a major contention of the PDP in this case—that the unique political status and special problems of Puerto Rico alter the constitutional protections accorded individual citizens of Puerto Rico or the standard by which official actions are tested. *See,*

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[2] The PDP refers (at 11 & n.11) to United Nations debates about the status of Puerto Rico, but the United States has taken the position that this question is purely an internal matter for the United States, not a subject of legitimate United Nations interest. *See, e.g., Memorandum By The Government Of The United States Of America Concerning The Cessation Of Transmission Of Information Under Article 73(e) Of The Charter With Regard To The Commonwealth Of Puerto Rico*, 28 Dept. of State Bull. 584 (1953). If anything, the government's position before the United Nations undermines the PDP's claim that the people of Puerto Rico should receive lesser constitutional protection than their fellow citizens in the States because of Puerto Rico's "autonomy." *See generally* Note, *Puerto Rico: Colony or Commonwealth?*, 6 N.Y.U. J. Int'l L. & Pol. 115 (1973).

e.g., *Torres*, 442 U.S. at 472-74; *Flores de Otero*, 426 U.S. at 596-97; *Calero-Toledo*, 416 U.S. at 668 n.5, 672-75 & n.9. Most pointedly, while acknowledging Puerto Rico's internal autonomy, the Court in *Flores de Otero* noted that this autonomy is what is "normally associated with States of the Union." 426 U.S. at 594. However,

> "[W]hen Congress relinquished its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the States, *the need for federal protection of federal rights was not thereby lessened.*" *Id.* at 597 (emphasis added).[3]

II. QUALIFIED VOTERS ARE CONSTITUTIONALLY ENTITLED TO ELECT THEIR LEGISLATIVE REPRESENTATIVE, WHETHER THE VACANCY TO BE FILLED ARISES UPON EXPIRATION OF A TERM OR DURING IT.

1. The PDP makes no attempt to confront the direct evidence of the Framers' intent (discussed in our opening brief at 17-20) to guarantee the popular election of State representatives. Instead, the PDP simply quotes ostensibly conflicting excerpts from *Minor v. Happersett*, 21 Wall. 162 (1875), and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). As explained in our opening brief (at 14-15),

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[3] The cases on which the PDP relies are not to the contrary. *Harris v. Rosario*, 446 U.S. 651 (1980), and *Califano v. Torres*, 435 U.S. 1 (1978), at most hold only that Congress may treat Puerto Rico differently from the States when it structures a federal spending program, as long as it has a rational basis for doing so (such as the fact that the people of Puerto Rico do not pay federal income taxes). This hardly means that Puerto Rico may trench on the voting rights of its citizens when the States may not.

Similarly, the pre-Compact decisions (cited at 12 n.14) in the *Insular Cases* and *Balzac v. Porto Rico*, 258 U.S. 298 (1922), are of very dubious authority, *see, e.g.*, *Torres*, 442 U.S. at 475 (Brennan, J., concurring); *Reid v. Covert*, 354 U.S. 1, 8-10, 14 (1957) (plurality opinion), especially in light of later decisions like *Duncan v. Louisiana*, 391 U.S. 145 (1968). But whatever the status of those early cases, the constitutional guarantees invoked by appellants apply to Puerto Rico exactly as they do to a State, because they are fundamental and because Congress has extended them in full measure to Puerto Rico.

however, these cases only acknowledge that the Constitution itself does not prescribe the *qualifications* for voters. Neither holds that the States (or Puerto Rico) are free to establish appointed legislatures. On the contrary, *Minor* expressly recognizes that "necessarily the members of the Legislature . . . are elected by the voters of the State." 21 Wall. at 176. Congress and the people of Puerto Rico agreed that this electoral process should be adopted and protected in Puerto Rico as well.

2. Without explanation and without citation of any authority, the PDP asserts (at 21) that, even if the Constitution requires the election of State legislatures, nothing precludes filling mid-term vacancies by appointment. This claim ignores the unambiguous constitutional history set out in our opening brief (at 21-24), which shows that when the Framers referred in the Constitution to the "Electors of the most numerous Branch of the State Legislature," they contemplated that State legislative representatives would be elected even when the vacancy to be filled arose between general elections. In line with the British and federal practice, virtually every State up through the adoption of the Fourteenth Amendment expressly demanded special elections for the replacement of elected State representatives, even when the normal term of office was as brief as one year.

This consistent practice shows that the right of qualified voters to elect their legislative representatives was understood as a "continuing right" to fill mid-term vacancies. *See Jackson v. Ogilvie*, 426 F.2d 1333, 1336 (7th Cir.), *cert. denied*, 400 U.S. 833 (1970). The practice thus implements basic principles of our republican form of government: "in Hamilton's words, 'that the people should choose whom they please to govern them,'" *Powell v. McCormack, supra*, 395 U.S. at 547, and that State legislatures, as bodies "responsible for enacting laws by which all citizens are to be governed," should be "responsive to the popular will." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).[4]

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[4] In *Patterson v. Burns*, 327 F. Supp. 745 (D. Hawaii 1971), the court suggested in dictum that filling legislative vacancies by gubernatorial appointment would be consistent with reapportionment decisions based on the equal protection clause, but the court specifically eschewed consideration of the distinct right on which we rely, the right to vote for State legislators. *See id.* at 749.

3. The First Circuit's recent decision in *Cintron Garcia v. Romero Barcelo, supra,* provides scant support for a contrary conclusion. In reversing a preliminary injunction against certification of a party appointee to the Puerto Rico House of Representatives, the court there relied on the same handful of lower federal court decisions that the PDP cited in its Motion to Dismiss in this case. *See* Appellees' Supp. Br. at 9a. Almost all those decisions dealt with appointments to fill vacancies in city councils or county commissions, not State legislatures, and none of them has been approved by this Court, even on their limited facts.

More importantly, the First Circuit itself expressly recognized in *Cintron Garcia* that the court was addressing a question only "similar in some respects" to the question presented here. Appellees' Supp. Br. at 15a. The appointment in *Cintron Garcia* was to fill a vacancy in an at-large seat, rather than a seat representing a single-member district. As the court concluded (*id* at 12a), there may well be "particularly strong" reasons to permit party appointments in that circumstance, since a requirement for an open election could defeat the whole point of at-large seats under the Puerto Rico system—to promote minority party representation. That objective is not relevant here. This case concerns the selection of an official to represent not a minority, but the *entire* population of District 31.

4. The PDP's reliance on *Valenti v. Rockefeller,* 292 F. Supp. 851 (S.D.N.Y. 1968), *aff'd per curiam,* 393 U.S. 405 (1969), similarly overlooks a critical point of distinction: the appointment sustained there was made pursuant to the special provisions of the Seventeenth Amendment. In recognition of the historic constitutional arrangement under which U.S. Senators for more than a century were directly appointed by State legislatures, that amendment expressly authorizes "temporary appointments [to the Senate] until the people fill the vacancies by election as the legislature may direct." This means, as *Valenti* held (292 F. Supp. at 856), that the Seventeenth Amendment permits only a *temporary* appointment *pending a special election.* The Puerto Rico system, in contrast, would

substitute an appointed legislator for an elected legislator for up to an entire four-year term. Virtually without exception, neither any State nor the Federal Government permits an appointee to serve so long in either chamber of its legislature free from the electorate's control.[5]

5. Although the present Puerto Rico electoral law was enacted pursuant to a 1964 referendum authorizing district vacancies to "be filled as provided by law," popular approval of the referendum does not immunize the statute from constitutional scrutiny. The terms of the referendum were so general that its ratification hardly suggests that the people of Puerto Rico knowingly intended to sacrifice their voting rights. More importantly, voting rights are "individual and personal" constitutional rights, *Reynolds v. Sims, supra,* 377 U.S. at 561, that could not, in any event, "be infringed simply because a majority of the people choose" that they be. *Lucas v. Colorado General Assembly,* 377 U.S. 713, 736-37 (1964). *See also, e.g., Avery v. Midland County,* 390 U.S. 474, 481 n.6 (1968); *Reitman v. Mulkey,* 387 U.S. 369 (1967).

6. The PDP also contends (at 21-22) that recognition of a right of election would have "vast" ramifications, including the invalidation of virtually every statute in the country that authorizes the appointment of successors to vacant offices. This claim ignores two important points: (1) special district elections to fill legislative vacancies are sporadic and minimally burdensome and (2) the principles at issue in this case can properly be limited to vacancies in seats for single-representative districts in State-wide legislatures.

a. A similar *in terrorem* argument about ill effects on State legislatures did not dissuade this Court from enforcing constitutional rights in the reapportionment cases. The Court required application of the "one-person, one-vote" principle to both chambers of all State legislatures in *Reynolds v. Sims,*

[5] At present only Maryland would allow an appointed successor legislator to serve for four years. Maryland, however, is presently considering a measure to rectify this situation. *See* Md. House Bill No. 666 (1982).

supra, despite protest that the apportionment schemes of at least 41 States would be overturned. *See* 377 U.S. at 610 (dissenting opinion). In addition, since under *Reynolds* voters have a continuing right to equal apportionment, compliance with that decision remains a substantial burden for State legislatures facing population shifts and for federal courts called upon to monitor their compliance with the Constitution.

The principle for which appellants contend, by contrast, would have a far more limited impact than *Reynolds*. Only a minority of the States have deviated from our Nation's historic commitment to the election of legislative representatives by providing for appointments to fill mid-term vacancies.[6] Even more importantly, as the PDP itself recognizes (at 17, 21), this case involves only the means for meeting "the occasional and unforeseeable problem of filling vacancies"—"an unusual occurrence." The experience in Puerto Rico itself shows just how minimal a burden Puerto Rico, as well as the States, would encounter under what we submit is the constitutionally required process.

During the period from 1952 to 1964, when the Puerto Rico Constitution expressly required special elections to fill legislative vacancies that arose more than 15 months before the next general election, Puerto Rico had only four occasions to hold special elections. *See* J.S. App. 11a. Since 1964, there have been only four vacancies in district seats, including this one. *See* J.S. App. 23a-25a. There is no reason to assume that vacancies in State legislatures arise with disproportionately greater frequency. Thus, enforcement of the constitutional right to open by-elections would scarcely impose on Puerto Rico or the minority of States aligned with it any significant expense or disruption.

b. The PDP also asserts that the right to fill legislative vacancies by election cannot be confined to the selection of legislators. Appellants' arguments in support of this right, however, are rooted, first, in Article I, section 2 of the Constitution, which refers only to election "of the most numerous

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[6] In Appendix A to this brief, we explain the disparities between the PDP's and appellants' tallies of the States that would be affected by a decision in this case.

Branch of the State legislature," and, second, in Article IV, section 4, which has long been understood to require elected legislatures, not elected executive officers or other bodies, as part of a "republican form of government." *See Minor v. Happersett, supra,* 21 Wall. at 175. Protection of appellants' electoral rights in this case, therefore, would not imply that vacancies in other offices must be filled in the same way. Legislatures exercising general, State-wide law-making power are constitutionally distinct.

The PDP's fear that the decision here will control the selection of State executive officers is groundless. The Court has already upheld the validity of an appointment of a State's governor. *Fortson v. Morris,* 385 U.S. 231 (1966). Although the Constitution expressly contemplates the election of State legislative representatives, the Court explained in *Fortson* that there "is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor." *Id.* at 234. This distinction mirrors constitutional history. When the federal Constitution was adopted, the constitutions of each of the original States provided for at least one popularly elected branch of the legislature (*see* Appellants' Br. at 20 and App. IV), but only five of the original States selected their chief executive officer by direct vote.[7] The Founding Fathers thus understood the concept of a "republican form of government" as guaranteeing the popular election of those who make the laws, but not necessarily those who execute or administer them. *See* III *Debates on the Federal Constitution* 93 (J. Elliot ed., 1907) (appointment of chief executive not "destructive" to

[7] Comm. on the Judiciary, *Direct Popular Election of the President and Vice President of the United States,* S. Rep. No. 96-111, 96th Cong., 1st Sess. 7 (1979). In four of these five States, the legislature had a contingent role in selecting the governor. *Id. See also* W. Adams, *The First American Constitution* 293-307 (1980) (six states in immediate post-revolutionary constitution provided for gubernatorial selection by means other than direct election).

democracy) (remarks of Madison). *See also The Federalist* No. 39; *Patterson v. Burns, supra*, 327 F. Supp. at 750 n.21.[8]

For similar reasons, the PDP's discussion (at 6-7, 22) of Presidential selection and succession has no bearing on the issues here. The procedures prescribed by the Constitution for choosing the President respond to "specific historical concerns" that have nothing to do with the choice of State legislators. *Gray v. Sanders*, 372 U.S. 368, 378 (1963). *See also Reynolds v. Sims, supra*, 377 U.S. at 572-77. Unlike Article I, section 2 of the Constitution, which expressly contemplates the popular election of State representatives, Article II, section 1, permits the appointment of the members of the electoral college, without any participation by the electorate, and this mechanism was chosen precisely to prevent the selection of the President from being left to the people. *Gray v. Sanders, supra*, 372 U.S. at 376 n.8; *see* Comm. on the Judiciary, *supra*, S. Rep. No. 96-111, at 6. Nothing decided in this case could put in question the mechanisms that have been established for selection of the President, or for succession to that office. These mechanisms are specially dictated or authorized by separate provisions of the Constitution. *See* U.S. Const., Art. II, Sec. 1 and Amends. XII and XXV.

Nor must the right to elect State representatives extend to the members of local legislative councils. These bodies are very different from State legislatures. They do not exercise the legislative rights of sovereign states, but rather are the creatures of sovereign entities, exercising only those powers that the State has conferred on them.[9] The Court has never held that any such

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[8] *Compare Sailors v. Kent Board of Education*, 387 U.S. 105 (1967) (upholding the appointment of local administrative officers); *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973) ("one-person, one-vote" principle inapplicable to election of judges).

Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981), *cert. granted*, No. 81-1055 (February 22, 1982), presents a different question: whether denial of a right—created by State statute—to vote to fill vacancies on the State supreme court violates the federal right to due process of law.

[9] *See, e.g., Community Communications Co., Inc. v. City of Boulder*, 50 U.S.L.W. 4144, 4147 (U.S. Jan. 13, 1982). *See also, e.g., Ball v. James*, 451 U.S. 355 (1981) (special purpose bodies with limited legislative authority not subject to the "one-person, one-vote" principle).

body must be constituted through the elective rather than the appointive process, *see Sailors v. Kent Board of Education, supra*, 387 U.S. at 109-10, and questions concerning the composition of local governmental entities are not before the Court in this case.

7. Finally, the PDP (at 22) attempts to tax appellants with failing even to permit an exception for temporary appointments on the eve of a regular or special election. Inconsistently, the PDP then urges (at 22-23) that recognition of "temporary" appointments would force the Court to enter a line-drawing "thicket" that it should avoid. Appellants' position, however, accommodates temporary appointments pending the holding of a by-election or an imminent general election.

Temporary appointments may well be justified as serving compelling governmental interests by, for example, providing some form of representation until an election can be held. There would be nothing especially difficult or elusive for the courts to decide in determining when a State has crossed the line between the tolerably "temporary" and the intolerably lengthy. *See, e.g., Marston v. Lewis*, 410 U.S. 679 (1973) (defining valid durational residency voting requirement); *Valenti v. Rockefeller, supra* (approving "temporary" appointment of U.S. Senator). The real point, though, is that this case does not involve a purportedly temporary appointment. The Puerto Rico statute provides for a party appointee to fill the seat even when, as here, virtually the entire four-year term remains.

III. APPOINTMENTS TO FILL VACANCIES IN SINGLE-MEMBER DISTRICT SEATS VIOLATE THE CONSTITUTIONAL RIGHT OF THE QUALIFIED VOTERS OF THESE DISTRICTS TO PARTICIPATE EQUALLY IN THE POLITICAL PROCESS.

1. Unlike the residents of every other legislative district in Puerto Rico, the qualified voters of District 31 are to be "represented" for almost four years by a legislator who has been appointed, not elected. Nevertheless, the PDP maintains

that there is no equal protection violation because the Puerto Rico statute applies to all citizens in all districts. But the fact that the system disenfranchises members of one party in a particular district on one occasion and has the same effect on members of another party in a different district on another occasion does not satisfy equal protection requirements. The abstract exposure of all citizens to an adverse contingency cannot justify a classification that in fact discriminates among voters when the contingency arises. The issue here is whether, with *any* vacancy in a single-member district seat, the voters of the district concerned may be singled out for "representation" by an appointee.

2. The PDP argues that the Puerto Rico statute is saved by the fact that any discrimination is not "total" or "permanent." The PDP states that *Rosario v. Rockefeller*, 410 U.S. 752 (1973):

> "characterized the cases in which the Court has struck down voting rights provisions as ones in which 'the State totally denied the electoral franchise to a particular class of residents. . . '" Appellees' Br. at 26, *quoting* 410 U.S. at 757.

The language omitted from the quotation, however, shows that the reference in *Rosario* to "total" denial meant only that "there was no way in which the members of [the disadvantaged] class could have made themselves eligible to vote." 410 U.S. at 757; *see Kusper v. Pontikes*, 414 U.S. 51, 60 (1973). Under Puerto Rico's appointment system, appellants also suffered that "total" incapacity. Far from supporting the PDP's "permanency" test, *Snowden v. Hughes*, 321 U.S. 1 (1944), also cited by the PDP for this proposition, actually confirms what should be obvious in any event—intentional discrimination may be "a denial of equal protection, even though it is neither systematic nor long-continued." 321 U.S. at 9-10. *See, e.g., Illinois Elections Board v. Socialist Workers Party*, 440 U.S. 173 (1979).

Puerto Rico surely would have violated the equal protection clause if it had provided that in 1980 all Puerto Rico electors, except the residents of District 31, would be eligible to vote for their district representatives, but in 1984 even the

members of District 31 would be eligible to vote. Yet the appointment of Representative Muniz's successor, pursuant to the electoral law, has put appellants in precisely the same disadvantaged position.

3. Finally, the PDP notes that in *Sailors v. Board of Education, supra,* and *Fortson v. Morris, supra,* the Court rejected equal protection challenges to the selection of certain administrative officials by appointment. Appellants' equal protection claim, however, applies only to an appointment of a representative for a single-member district in a multi-member elected body, since only such an appointment results in singling out some voters otherwise similarly situated for "representation" by an appointee. Neither *Sailors* nor *Fortson* involved any such arrangement.

IV. THE POWER TO APPOINT LEGISLATORS MAY NOT CONSTITUTIONALLY BE VESTED IN A POLITICAL PARTY.

1. Five states and Puerto Rico entrust the power to fill legislative vacancies to political parties rather than to elected officials. *See* App. A, *infra,* at 3a. The Puerto Rico statute thereby excludes non-party members from having any voice in the selection of their representative solely because of their political affiliation. In addition to its other defects, therefore, the statute violates both First Amendment and equal protection principles. *See* Appellants' Br. at 26-31.[10]

2. The PDP contends that, if there is no constitutional right to elect legislative successors, then there are no "practically foreseeable limits" (at 29) on the State's discretion about how to make interim appointments. The statutory mechanism for choosing a legislative successor, however, is

[10] The First Amendment claim was subsumed by appellants' intervention petition, JA 44 (¶¶ 4-5), and appellants specifically argued their First Amendment rights at the hearing before the Superior Court. *See* Br. for Appellant Intervenors before the Supreme Court of Puerto Rico at 17, R162. *See also* JA 41 n.1. Appellants also expressly raised the First Amendment claim in the Supreme Court of Puerto Rico. *See* Br. for Appellant Intervenors at 17, 25, R162, 170 (translation); Motion of Appellant Intervenors for Reconsideration at 2 ff., R299 ff. (translation).

"state action" that must be subject to the constitutional constraints against unlawful discrimination, whether an appointive or elective mechanism is adopted.[11] The State may not exercise even discretionary power in a way that discriminates against members of a particular race, color, creed, or, as here, political party. *See, e.g., Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947).

3. Although the statute is facially neutral and its restrictions last "only" several years, these facts no more excuse its violation of the First Amendment than they satisfy the equal protection objections (*see* pp. 12-13, *supra*). In *Elrod v. Burns*, 427 U.S. 347 (1976), for example, the Court concluded that the First Amendment barred the practice of patronage dismissals, reasoning:

> "[R]egardless of how evenhandedly these restraints may operate in the long run, after political office has changed hands several times, protected interests are still infringed and thus the violation remains.
>
> * * *
>
> "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 360, 373 (plurality opinion).

4. The PDP attempts to take comfort from congressional action permitting party appointments. In 1938 Congress amended the Organic Act of 1917, which had required the filling of vacancies in the Puerto Rico legislature by special election, to permit the Governor of Puerto Rico to appoint a successor upon recommendation by the predecessor's party. However, Congress's judicially untested amendment of the Organic Act over 40 years ago, when there was no Compact expressly guaranteeing that the people of Puerto Rico enjoy the

[11] In fact, in this case an elective procedure was used to fill Representative Muniz's seat, since Mr. Corujo, as the PDP admits (at 3), was chosen by a primary election.

same basic constitutional rights as the citizens of the States, has little significance today.

Moreover, in suggesting (at 6, 31) that Congress recently authorized the District of Columbia to follow a party appointment system, the PDP is simply wrong. Section 1-141 of the District of Columbia Charter, enacted by Congress in 1973 when it granted limited "home rule" to the District, explicitly requires that *any* vacancy on the D.C. Council be filled by special election.[12] Thus, in the case of the District of Columbia, Congress actually reiterated its earlier endorsement of the requirement in the original Puerto Rico Constitution for special elections to fill legislative vacancies. *See* Appellants' Br. at 12-13.

5. Finally, the PDP argues (at 32) that, if it is permissible to appoint successor legislators, the power of appointment must be vested somewhere, and vesting it in a political party is no more partisan than vesting it in the governor. This argument ignores the empirical evidence showing that, when governors are authorized to make appointments, they do not simply rely on political loyalty. *See* Appellants' Br. at 31 n.24. Moreover, unlike appointments by political parties, gubernatorial appointments at least have the legitimacy of derivative voter approval and control. *See generally The Federalist* No. 39. For similar reasons, the Court in *Sailors v. Kent Board of Education, supra,* and *Fortson v. Morris, supra,* upheld the selection of executive officers by elected public bodies, including the legislature itself. *See Kramer v. Union Free School District No. 15,* 395 U.S. 621, 629 n.12 (1969). *See also* U.S. Const., Amend. XVII (governor to make temporary appointments to U.S. Senate). The availability of these constitutional mechanisms for appointments by elected officials makes appointment by a political party needlessly offensive to First Amendment rights.

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[12] To preserve minority representation on the Council, political parties are allowed to control *temporary* appointments to fill vacancies in four at-large seats on the Council. Preservation of minority representation may be a compelling governmental justification for those provisions. *See Hechinger v. Martin,* 411 F. Supp. 650 (D.D.C. 1976), *aff'd mem.,* 429 U.S. 1030 (1977). Under Section 1-141(d)(2) these appointments last only "until the board of Elections and Ethics can hold a special election to fill such vacancy . . . ."

V. NO LEGITIMATE OR COMPELLLING PURPOSE JUSTIFIES THE PUERTO RICO STATUTE.

1. The Puerto Rico electoral law is *presumptively* invalid because it interferes with constitutionally protected rights. *See* Appellants' Br. at 32-33. *See also Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 50 U.S.L.W. 4071, 4072, 4073 (U.S. Dec. 14, 1981), where the Court recently reiterated that "regulation of First Amendment rights is *always* subject to exacting judicial review" (emphasis added). Only a demonstration of some compelling governmental interest can dissipate the presumption and save the statute. The PDP cannot escape this heavy burden by describing this case (at 28) as involving only "matters of practical governance." The distribution and operation of the franchise, which determine how lawmakers gain and legitimize their power, are not simply "mechanical" problems of operating a state.

2. The PDP's principal argument (at 14-16, 31-34) in support of the Puerto Rico statute is that party appointments are necessary to preserve minority representation in the Puerto Rico House of Representatives. This argument is ironic because from 1952 through 1968 the PDP's candidates held *every* district seat in the Puerto Rico House and Senate. Even today, legislators affiliated with the PDP make up a majority in both chambers, albeit by a single seat in the House—the one here at issue.

Even if special mechanisms to secure minority representation are justified by a compelling state interest, and even if the PDP has standing to assert those interests, this case does not involve those mechanisms. Puerto Rico seeks to promote minority representation by (1) providing for limited voting for *at-large* representatives, (2) adding seats when candidates from one party win more than two-thirds of the House seats, and (3) protecting minority control of *those* seats through party-controlled appointments to fill mid-term vacancies. *See* Appellees' Br. at 14-16. These provisions are set forth in the Puerto Rico Constitution. *See* Puerto Rico Const., Art. III, §§ 3, 7, 8. They are not at issue here.

Appellants are challenging paragraphs 1 and 2 of Article 5.006 of the Electoral Law of Puerto Rico (*see* J.S. App. F), which govern the filling of vacancies in single-member *district* seats. A district seat belongs to the candidate who obtains the most votes from district voters, irrespective of the candidate's party. The committee that drafted the Puerto Rico Constitution explicitly distinguished the purposes of the district seats and the at-large seats. *See* App. B, *infra*, at 5a-6a. Since the provisions under review have nothing to do with the promotion of minority representation, the court below, understandably, did not mention this goal as an allegedly "compelling interest" served by the statute. *See* J.S. App. 14b.

Moreover, even if the "party ownership" feature of Article 5.006 had as its goal the protection of minority representation, the statute would be fatally over-inclusive. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 345-54 (1972). As illustrated by this case, the statute authorizes party appointments to fill vacancies in district seats, which constitute the largest group of seats in the House and which are not intended to promote minority representation. Indeed, as here, the "party ownership" system freezes out minority voters in a district when a vacancy arises, even though they and other voters may prefer to coalesce as a new majority in favor of a candidate from a different party.

3. It is difficult to understand the PDP's argument (at 14) that "continuation of the political party balance expressed in the preceding election may more accurately reflect the desires of the electorate than the results of a special election." Appointment by a political party cannot more accurately reflect the popular will than a direct election. As the Illinois Supreme Court explained in striking down on State constitutional grounds an appointment by a political party even to a local county board, political parties are private associations that "are not accountable to the public" and may not "substantially

represent the populace of the area affected by the appointment." *Rudman v. Rini*, 64 Ill.2d 321, 323, 356 N.E.2d 4, 7 (1976).[13]

The Framers of Puerto Rico's Constitution originally recognized that "greater democratic guarantees" would be protected by requiring by-elections to fill vacancies like the one now at issue. *See* App. B, *infra*, at 6a. Their report explained: "The political parties are a necessary and desirable instrument in the democratic function, but they should not assume the functions that belong to the people." *Id.*

4. The PDP offers the inconsistent arguments that special elections should be avoided both because "voter interest in special elections is apt to be minor" (at 14) and because special elections are likely to arouse the electorate's "passions" (at 35). The short answer is that Puerto Rico may not constitutionally curtail the electoral rights of all its citizens simply because some might choose not to exercise them. Nor may it suppress lawful political speech, however "passionate." *See* Appellants' Br. at 36-39. *See also Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, supra*, 50 U.S.L.W. at 4072-73.

In defending the Constitution's insistence upon a republican form of government, James Madison anticipated and denounced the concerns about factional "passion," the very argument now advanced by the PDP, explaining that it would be "folly to abolish liberty, which is essential to political life, because it nourishes faction . . . ." *The Federalist* No. 10, at 78 (New American Library ed., 1961). Later, Madison reasoned that, because it is "essential to liberty that the government in general should have a common interest with the people," it is

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[13] "Party ownership" would necessarily frustrate the popular will in many instances. *See, e.g.*, J. Bibby, T. Mann, N. Ornstein, *Vital Statistics on Congress, 1980*, at 8-9 (1980), showing that open by-elections from 1946 through 1978 resulted in a *net* party shift in congressional seats of over 16.5% (34 net shifts in 206 special elections).

The casting of a significant number of "split ballots" in the election won by Representative Muniz demonstrates that Puerto Rico electors vote for and elect the candidate, not his party. Indeed, at least one of the appellants, who are not affiliated with the PDP, crossed party lines to vote for Representative Muniz.

"particularly essential" for the legislature to have "an immediate dependence on, and an intimate sympathy with, the people." *Id.*, No. 52, at 327. Far from manifesting the kind of resentment for by-elections reflected in the PDP's arguments, Madison then concluded:

> "Frequent elections are unquestionably the *only* policy by which this dependence and sympathy can be effectually secured." *Id.* (emphasis added).

5. Faithful to this tradition, decisions by this Court, with which the PDP does not take issue, establish that expense alone does not justify restriction of the franchise. *See* Appellants' Br. at 35-36. Nevertheless, the PDP suggests that Puerto Rico's "poverty" (at 35) excuses it from otherwise applicable constitutional duties. It is hyperbole, however, to argue that Puerto Rico cannot afford the expense of sporadic district elections to fill legislative vacancies. When the need for a special election does arise—once every few years, on the average—the government's expenses consist only of the minimal costs of printing ballots, supervising polling places in two precincts for one day, and counting the votes. The infrequent call to allocate a few thousand dollars out of Puerto Rico's annual budget of $3.1 billion is a rather modest price for the protection of so important a constitutional principle as representative government.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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Appendix

APPENDIX A

I. Election Versus Appointment

The PDP names 23 jurisdictions in a list of "States Requiring Legislative Vacancies to be Filled by Appointment" (Appellees' Br., App. D). Five of these appear in appellants' compilation of jurisdictions in which *an election* is required (J.S. App. G). The discrepancy is explained by the fact that these five are jurisdictions in which elections are required in certain circumstances, while appointments are permitted in other circumstances. The jurisdictions in question, with a synopsis of their election/appointment rules, follow:

Alaska

As appellants' appendix explains (J.S. App. G note (a)), the "Governor makes appointments to house of representatives for remainder of unexpired term [this term being two years]. If unexpired senate term is less than 2 years 5 months, the Governor makes appointment. If longer, the Governor shall call a special election." *See* Alaska Stat. §§ 15.40.320 *et seq.*

District of Columbia

The Board of Elections and Ethics must hold special elections to fill *all* vacancies in the legislative body, the District of Columbia Council. *See* D.C. Charter, § 1-141. Although party-controlled interim appointments are specially authorized to fill vacancies in a minority of "at-large" seats, these appointments are only "until the Board of Elections and Ethics can hold a special election to fill such vacancy . . . ." *Id.* § 1-141(d)(2).

Nevada

As appellants' appendix explains (J.S. App. G note (i)), replacements are elected "if biennial or regular election takes place between time of vacancy and next legislative session; if no such election is scheduled, board of county commissioners appoints person of same political party." *See* Nev. Const., Art. 4, § 12.

Ohio

Appellants' appendix (J.S. App. G note (k)) states that in Ohio vacancies are "filled by election by members of legislative body affiliated with same political party." Vacancies occurring during the first 20 months of a senatorial term are to be filled only "temporarily" by such a legislative election, the remaining portion of the unexpired term being filled at the next general election. *See* Ohio Const., Art. II, § 11.

Tennessee

As appellants' appendix explains (J.S. App. G note (m)), an election is required to fill a vacant seat if "12 months or more remain prior to next general election." *See* Tenn. Code Ann. § 2-14-201.*

II. Party Control of Replacement

The PDP lists 16 States and the District of Columbia as jurisdictions requiring that legislative vacancies be filled by the appointment of a member of the former incumbent's political party or upon the party's designation (Appellees' Br., App. D). Appellants' appendix (J.S. App. G) lists three fewer states in this category. Explanations for the discrepancies follow:

District of Columbia

Party involvement occurs only in the case of vacancies in "at-large" seats (four out of thirteen seats) and only for the limited time until a special election can be called. D.C. Charter, § 1-141(d)(2).

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* Appellants' appendix shows New York, in addition to 18 other jurisdictions, as not requiring election. The PDP, however, has omitted New York from their list of "appointment" states. The New York Constitution and statutes are ambiguous on the point, *see* N.Y. Const., Art. 13, § 3; N.Y. Pub. Off. Law § 42 (McKinney), and we have found no decision clarifying the matter.

Nevada

As appellants' appendix explains (J.S. App. G note (i)), replacements are elected "if biennial or regular election takes place between time of vacancy and next legislative session; if no such election is scheduled, board of county commissioners appoints person of same political party." *See* Nev. Const., Art. 4, § 12.

Wyoming

Appellants' appendix (J.S. App. G note (n)) states that the board of county commissioners "makes temporary appointment; general elections held every 2 yrs." Political party involvement in the selection process comes in the following form: When a vacancy in the state legislature occurs, a "temporary successor" (the statutory designation) is selected by the board of county commissioners from a list of three qualified persons submitted to it by the county central committee of the political party to which the prior incumbent belonged. *See* Wyo. Stat. § 22-18-111(a)(ii).

Only five of the States—Colorado, Illinois, Indiana, Maryland, and North Carolina—actually empower the political party to appoint a successor legislator. In every other State that permits a political party to play a role in filling the vacancy, an elected official or body exercises discretion over the final selection. *See* the statutes cited in Appendix G to the Jurisdictional Statement.

APPENDIX B

Supplemental Report of the Commission on the Legislative Branch of the Puerto Rico Constitutional Convention, December 28, 1951 *

To the Constitutional Convention:

The report rendered by your Commission on the Legislative Branch on December 7, 1951, did not include any reference to the composition of the Houses, the manner of representation, the creation and revision of electoral districts, requirements to be met by members of the Legislative Assembly, date when their terms shall begin to run and the procedure to fill vacancies. The Commission separated these subject matters and entrusted the study thereof to a subcommission, with instructions to make an analysis of all the propositions insofar as they touch on these matters and to enter into discussions and consultations with other members of the Convention, after which it would submit its recommendations to the Commission in full so that the latter could in turn inform the Constitutional Convention.

Your Commission has carefully studied all the points of view contained in the propositions that were filed and expressed individually by the delegates. Upon examining all the subject matters contained in this supplemental report, we have been aware of the careful consideration that must be given to the matter dealing with the composition and organization of the legislative power. We have been guided by the principle that even the wisest constitutional provisions would not hold any force or effect if they did not guarantee the expression of the will of the people in the operation of the legislative power. We believe that this principle cannot be upheld unless we can be certain that provision is made for an adequate and just representation, with respect to the geographical and population factors as well as with respect to the diversity of criteria and

* Unofficial translation of Report published as "Informe Complentario de la Comisión de la Rama Legislativa" in *Records of the Constitutional Convention of Puerto Rico, 1951-1952.*

ideologies that affect the public trend of thought. To that effect it is fundamental for democratic soundness that the minority should have a representation which even under the most unfavorable circumstances, should be able to adequately comply with its function of checking and stimulating the majority in performing its government work without creating any hardships that may result detrimental to democracy. In any event, the people should have the means to insure that its representatives shall always answer to the true will of the constituents.

In order to accomplish these purposes your Commission has presented a substitute proposition containing the recommendations which are analyzed below:

Composition of the Houses and Creation and Revision of the Electoral Districts

Section 1.—The Senate shall be composed of twenty seven (27) senators and the House of Representatives of fifty one (51) representatives, except when said composition may be increased in any of the houses by virtue of the provisions of Section 4.

Section 2. . . .

There shall also be elected eleven (11) senators at large and eleven (11) representatives at large and such candidates as shall receive the highest number of votes shall be considered elected for such offices. No elector may vote for more than one (1) candidate for senator at large or for more than one (1) candidate for representative at large.

* * *

Minimum Guarantees of Representation

Section 4.—If in any general election more than two-thirds of the members of either house are elected from one political party or from a single ticket, as both are defined by law, the composition of said house shall be increased in the following cases:

* * *

The additional senators and representatives whose election is declared under this section shall be considered for all purposes as senators at large or representatives at large.

In all cases it shall be understood that the original number of members of the Senate is twenty seven (27) and the original number of members of the House of Representatives is fifty one (51).

The Commission on the Legislative Branch believes that the best and most democratic manner of electing a legislative assembly is by recognizing the principle of representation to the different geographical areas. In the discussion of the preceding subject matter we have expressed our opinion that this principle is complemented by creating a reasonably high number of seats to be filled by at large candidates, so that each elector may vote for its local legislators (two for the Senate and one for the House of Representatives) and its general legislators (one for the Senate and one for the House of Representatives). A reasonably high number of at large legislators in each house renders it feasible for the minority parties to increase their legislative representation. It is most advisable that the district representation be unitary, and that the legislators who have the responsibility to attend to the demands of their constituents should not be hampered in their commitment by a diversity of opinions which may arise from the district minority representation.

* * *

This formula of guarantee to the minorities has been produced and recommended by the Commission as a means to giving a fair interpretation to the will of the people and not as a concession to political parties.

* * *

Term of the Offices and Procedure to Fill Vacancies

* * *

As to the method of filling vacancies, the Commission believes that greater democratic guarantees are produced if

election is required as a general rule. The political parties are a necessary and desirable instrument in the democratic function, but they should not assume the functions that belong to the people. It is convenient, therefore, that as nearly as possible, the people be the one to fill the vacancies through the expression of the will of its voters.

* * *

Conclusion

The Commission on the Legislative Branch believes that if the recommendations stated in this supplemental report are adopted, the most solid guarantees for the democratic expression of the will of the people shall have been established.

San Juan, Puerto Rico, December 28, 1951.

Respectfully submitted,

/s/ LUIS A. NEGRON LOPEZ
Chairman

/s/ FRANCISCO L. ANSELMI
Secretary